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SCHOOL LAW

DECISIONS

January 1, 1990 to December 31, 1990

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Saul Cooperman
Commissioner of Education

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State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6949-88
AGENCY DKT. NO. 283-8/88

LAURA MAC MILLAN, LAWRENCE ZAMBROWSKI, ROBERT RODGERS and RICHARD WALLDOV,
Petitioners,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK,
Respondent.

Robert M. Schwartz, Esq., for petitioners

Martin R. Pachman, Esq., for respondent

Record Closed: November 6, 1989 Decided: November 17, 1989

BEFORE **DANIEL B. MC KEOWN**, ALJ:

INTRODUCTION

Laura MacMillan, Lawrence Zambrowski, Robert Rodgers, and Richard Walldov, (petitioners), in a petition to the Commissioner of Education, each claim tenure and seniority as supervisor in positions of department chair in the employ of East Brunswick Board of Education (Board). They further claim that the Board, following a reorganization of its positions of department chair effective September 1, 1988, appointed individuals without tenure or seniority in its employ to certain of the reorganized

supervisor positions and it appointed individuals to supervisor's position with less enforceable seniority than one or more of them possess. Petitioner's individually seek reinstatement to supervisor positions in the Boards employ, together with all back pay and emoluments they would have received had the Board not violated their asserted tenure and/or seniority rights. The Commissioner transferred the matter on September 22, 1988 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A 52:14F-1, et seq., after which the matter was assigned administrative law judge Joseph Lavery who conducted a prehearing telephone conference on November 15, 1988 and scheduled a hearing to commence February 14, 1989.

In the meantime, this judge was assigned the matter. At the hearing scheduled for February 14, 1989 the parties announced that the taking of testimony was unnecessary because all relevant facts to the dispute were to be stipulated. A stipulation of fact was filed February 27, 1989 which was then followed by memorandum filed by the parties in support of their respective position on April 3, 1989. Thereafter, it became apparent that the original stipulation of fact required additional facts in order to properly dispose of the issues presented. An amendment to the stipulation was submitted August 28, 1989. The amendment, however, was in part inconsistent with the facts originally stipulated or with facts which required no amendment. To resolve the matter of properly articulating facts being stipulated, this judge merged the initial stipulated facts with the amended stipulations, faxed the merged facts to both counsel on November 3, 1989. A conference call was conducted November 7, 1989 during which further oral amendments were made by the parties and subsequently memorialized and submitted in writing on November 14, 1989.

FACTS

The following stipulated facts chronicle the evolution of the controverted positions of department chair from pre-1984 to a major reorganization effective September 1, 1988. There is no issue presented here of the good faith under which the Board instituted the 1988 reorganization, while there is agreement between the parties that at all times relevant the Board obligated those in the position of department chair to be in position of a supervisor's certificate as issued by the State Board of Examiners.

MERGED STIPULATION OF FACTS

1. Prior to 1984, the following Department Chairperson positions existed at the East Brunswick Public Schools. One job description, E-12 and E-13, applied to department chair positions and all persons in these positions were obligated to be in possession of supervisor's certificates.

A. East Brunswick High School (Grades 10-12):

Position	Incumbent
Mathematics	Lemerich
Language Arts	Lawson
Science	Warwick
Industrial Arts	Stankeweicz
Guidance	LoPresti
Business	Majewski
Social Studies	Meyerhoff
Foreign Languages	Ferrill
Nursing	Seibles
Physical Education	Emery

B. Churchill Jr. High School (Grades 7-9):

Mathematics	Kady
English	MacMillan
Social Studies	Hany
Science	Zambrowski
Guidance	Chard
Industrial Arts	Nese
Health & Physical Education	Rice

C. Hammerskjold Jr. High School (Grades 7-9):

Mathematics	Walldov
English	Aceto
Social Studies	Wallace
Science	Alusik
Guidance	Fortino
Industrial Arts	DiPascuale
Health & Physical Education	Spadafino

2. As of July 1, 1984 a major reorganization occurred, with the following new positions resulting and the adoption of job descriptions. (See Amended Stipulation August 24, 1989). Descriptions relevant to this dispute — English, science, mathematics which is later amended to mathematics/computer studies — shall be discussed and as subsequently amended after all stipulated facts are presented.

A. East Brunswick High School (Grades 10-12):

Mathematics	Lemerich/Anna Weiss*
English	Lawson
Science	Warwick
Social Studies	Meyerhoff

* change in incumbent due to death.

B. New Secondary Department Chairperson positions:

Foreign Language (7-12)	Ferrill
Physical Education (7-12)	Emery
Guidance (7-12)	LoPresti
Health (7-12)	Rice
Computer Studies (7-12)	Rodgers
Special Ed (7-12)	Berman
Business-Cooperative Education (7-12)	Majewski
Visual & Practical Arts (7-12)	Stankeweicz

C. New Department Chairperson covering both Churchill and Hammerskjold Jr. High Schools, grades 7-9:

Mathematics	Kady
English	MacMillan
Science	Zambrowski
Social Studies	Wallace

3. Effective July 1986, Hammerskjold Jr. High School was reorganized as a middle school, grades 6-7. Churchill Junior High was reorganized to serve pupils in grades 8-9 as of July 1986. The East Brunswick High School continued to serve pupils in grades 10-12. Effective July 1986, the following changes occurred:

   A. The four Department Chairperson positions at Churchill and Hammerskjold Junior High School were abolished. Four Depart-ment Chairperson positions at Churchill Junior High School (8-9) were created in mathematics, English, science, social studies with no change in incumbents from 2C above.

   B. Rice's position as Department Chairperson Health (7-12) eliminated; Department Chairperson Health Education (K-12) created and Rice appointed; Department Chairperson Health Services (K-12) created and a Ms. Seibles appointed.

C. Emery's position as Department Chairperson Physical Education (7-12) became Department Chairperson of Physical Education (8-12) in which Emery continued.

D. Berman's position as Department Chairperson Special Education (7-12) became Department Chairperson Special Education (PK-7)/Guidance (6-8) to which Rocco Magliozzi was appointed and Department Chairperson Special Education (8-12) to which Berman was appointed.

E. LoPresti's position as Department Chairperson Guidance (7-12) became Department Chairperson Guidance (9-12), to which LoPresti was appointed.

F. Majewski's position as Department Chairperson Business-Cooperative Education (8-12) became Business-Cooperative Education (6-12); Majewski appointed.

G. Rodgers' position as Department Chairperson Computer Studies (7-12) became Department Chairperson Computer Studies (6-12). Rodgers continued in new position.

4. Effective September 1, 1988, another major reorganization occurred whereby the following changes to the Department Chairperson positions and staffing resulted:

Department Chairpersons Then Existing	Status	Titles of and Appointees to Newly Created Department Chairperson Titles
Health Education (K-12) Held by Rice	eliminate	
Health Services (K-12) Held by Seibles	eliminate	
	new	Health (K-12) (Rice appointed; Seibles retires)
Physical Education (8-12) Held by Emery	eliminate	
	new	Physical Education (K-12) (Emery appointed)

Special Education (PK-7)/ Guidance (6-8) Held by Magliozzi	revision	
	new	Special Education (PK-5)/ Guidance (6-7) (Magliozzi appointed)
Special Education (8-12) Held by Berman	revision	
	new	Special Education (6-12) (Berman appointed)
Guidance (9-12) Held by LoPresti	revision	Guidance (8-12) (LoPresti appointed)
Business/Cooperative (6-12) Held by Majewski	eliminate	
Fine/Practical Arts Held by Stankeweicz	eliminate	
	new	Technical/Career Education (6-12) (Stankeweicz appointed; Majewski reassigned to classroom)
Computer Studies (6-12) Held by petitioner Rodgers	eliminate	
Math (8-9) Held by petitioner Walldov	eliminate	
Math (10-12) Held by Weiss	eliminate	
	new	Math/Computer Studies (8-12) Position remains vacant; petitioners Walldov and Rodgers reassigned to classroom; Weiss resigns from Board's employ.)

English (8-9) Held by petitioner MacMillan	eliminate	
English (10-12) Held by Lawson	eliminate	
	new	English (8-12) (A Mr. Pincus, a new employee, assigned; MacMillan reassigned to classroom; Lawson appointed assistant principal.)
Social Studies (8-9) Held by a Mr. Walus	eliminate	
Social Studies (10-12) Held by Meyerhoff	eliminate	
	new	Social Studies/Media Services (8-12) (Mr. Walus appointed; Meyerhoff returned to classroom.)
Science (8-9) Held by Petitioner Zambrowski	eliminate	
Science (10-12) Held by Warwick	eliminate	
	new	Science (8-12) (A Mr. Penfield appointed; Zambrowski and Warwick resigned from the Board's employ)
TOTAL: 17		TOTAL: 10

5. Petitioner Laura MacMillan's employment history is as follows:

9/72 - 2/78	Teacher of English
2/78 - 6/84	Department Chairperson English - Churchill Jr. High School
9/84 - 6/86	Department Chairperson English (7-9)
9/86 - 6/88	Department Chairperson English (8-9)
9/88 - current	Teacher of English

6. When on September 1, 1988, the Board created the position of Department Chairperson English (8-12), Ms. MacMillan was not appointed to that position.

7. Petitioner MacMillan holds a certificate in English since September of 1972 and in Supervision since February of 1978; Principal Certificate since 1986, and; holds a Masters in English Education.

8. Effective September 1, 1988, Mr. Richard Pincus was appointed to the position of Department Chairperson English (8-12). Mr. Pincus was not previously employed by the Board, and holds the Principal/Supervisor Certificate from New Jersey, as well as certificates in English/Social Studies from New York.

9. The job descriptions for the abolished positions, as well as that for the new position, are attached to the amended stipulation as A1 through A7.

10. Petitioner Lawrence Zambrowski's employment history is as follows:

9/69 - 6/80	Teacher of Science
9/80 - 6/84	Department Chairperson Science - Churchill Jr. High School
9/84 - 6/86	Department Chairperson Science (7-9)
9/86 - 6/88	Department Chairperson Science (8-9)
9/88 - 2/13/89	Teacher of Science
2/13/89	Resigned

11. When on September 1, 1988, the Board created the position of Department Chairperson Science (8-12), Mr. Zambrowski was not appointed to that position.

12. Petitioner Zambrowski holds a certificate in Science since June of 1969 and the Principal/Supervisor Certificate since August of 1979.

13. Effective September 1, 1988, Mr. George Penfield was appointed to the position of Department Chairperson Science (8-12). Mr. Penfield was previously employed by the Board as a Teacher of Science since September of 1961 and was appointed to the position of Department Chairperson Science at the high school effective September 9, 1986. He holds certification as a Teacher of Science since 1966, as well as the rincipal/Supervisor Certificate since 1977.

14. The job descriptions for the abolished position, as well as that for the new position, are attached as B1 through B7.

15. The letter of resignation submitted by Mr. Zambrowski is attached as Exhibit C1, which is dated December 15, 1988 and the Board's acceptance effective February 13, 1989, (C2).

16. Petitioner Robert Rodgers' employment history is as follows:

9/1/76 - 6/30/84	Teacher of Mathematics
9/1/84 - 6/30/86	Department Chairperson Computer Studies (7-12)

9/1/86 - 6/30/88	Department Chairperson Computer Studies (6-12)
9/1/88 - present	Teacher of Computer Literacy

17. When on September 1, 1988, the Board created the position of Department Chairperson of Mathematics/Computer Studies (8-12), it did not appoint Mr. Rodgers to that position.

18. Petitioner Rodgers holds a certificate as a Secondary School Teacher of Science, Secondary School Teacher of Mathematics, both since 1969, and is certificated as a Supervisor/Principal since February 1982.

19. Petitioner Richard Walldov's employment history is as follows:

9/1/54 - 6/30-66	Teacher of Mathematics
9/1/66 - 6/30/84	Department Chairperson Mathematics - Hammerskjold Jr. High School
*9/1/84 - 6/30/87	Teacher of Mathematics
9/1/87 - 6/30/88	Department Chairperson Mathematics (8-9)

*When the Board reorganized in 1984, as noted above, it combined the two previous Department Chairperson-Jr. High School positions into a single position, awarding that position to Mr. Kady, who had held the equivalent position to that held by Mr. Walldov at the other Jr. High School. Mr. Walldov challenged this before the Commissioner of Education, and in a decision dated May 10, 1985 (attachment D), the Commissioner determined that the combined position was not a "new" position and that Mr. Walldov had a seniority entitlement to the position which now covered both Jr. High Schools. However, inasmuch as Mr. Walldov had not complied with the requirement of the new position to acquire subject area certification, the Board refused to place him in the position in September of 1986. Another Petition of Appeal was filed by Mr. Walldov under docket EDU 6387-86. This Petition was settled by an agreement to reinstate Mr. Walldov in the position of Department Chairperson Mathematics (8-9) for the 1987-88 school year if he acquired the subject area certification, and that no back pay would be due for the 1986-87 school year.

20. Petitioner Walldov acquired a Limited Elementary Certificate in 1954, a Permanent Elementary Certificate in 1959, the Principal/Supervisor Certificate in August 1983,[1] and Teacher of Mathematics certification in May of 1987.

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[1] Despite the earlier stated agreement that all department chairpersons were required to possess a supervisor's certificate issued by the State Board of Examiners, Walldov did not secure that certificate until August 1983.

21. When on September 1, 1988, the Board created the position of Department Chairperson of Mathematics/Computer Studies (8-12), it did not appoint Mr. Walldov to that position.

22. The position of Department Chairperson Mathematics /Computer Studies (8-12) remains vacant.

23. The job descriptions for the abolished positions, as well as that for the new position, are attached as E1 through E7, E9, E10, E11.

24. Of the ten Department Chairperson positions created as of September 1, 1988, the appointees in six of those positions had served in various department chair positions as they evolved since 1984. Of the remaining four positions, the Mathematics/Computer Science position remains vacant; the Special Education (PK-7)/Guidance (6-8) position was filled by a new employee, Ms. Margaret Walsh; the English (8-12) position was filled by Mr. Pincus, who was initially employed by the Board on September 1, 1988, and; the Science (8-12) position was filled by Mr. Penfield, who had served in the previous Science (8-9) position since September 9, 1986.

25. Of the seventeen incumbents who had served in the positions of Department Chairperson immediately prior to the 1988 reorganization, three have returned to the classroom. They are Mr. Majewski, who had served in various Department Chairperson positions since at least 1984; Ms. Meyerhoff, who had similarly served at least since 1984, and; Mr. Kady, who was a Department Chairperson at least since 1984 and was involved in the Walldov Petition referenced in paragraph #19 above.

26. The reorganization referred to above as having taken place on September 1, 1988 was actually voted upon by the Board at its meeting of May 12, 1988 (Minutes attached as Exhibits F1 through F20), and the appointment of the new Department Chairpersons took place on June 30, 1988 (Exhibits G1 through G15) and August 25, 1988 (Exhibits H1 through H10), effective September 1, 1988.

In addition to the foregoing stipulated facts, the following relevant facts are found to exist based on documentary evidence in this record.

Job descriptions and policy statements (See attachments to amended stipulation) adopted by the Board since 1984, and before 1984 (See E-12), for the department chair positions relevant to this dispute—English, science, mathematics, computer literacy, and mathematics/computer studies—establish that in addition to each

assigned department chairperson being obligated to possess a supervisor's certificate (A-1, A-2, B-5, E-5, E-1, E-9), each person was and is obligated to supervise teachers within those grade levels which encompass their chairperson assignment. Each chairperson was and is expected to work with school principals and others on curriculum development in the assigned subject matter. While it is true as the Board notes in its filed memorandum that since September 1, 1988 newly adopted policies underlying each department chair job description impose upon each chairperson the obligation to carry out administrative duties at the high school, neither the policy nor the job description itself specifies such "administrative duties". (See, as an example B-1 and B-2 as attached to the amended stipulation). The plain fact is that no substantial difference exists between the department chairperson positions pre-1984 through the major reorganization effective September 1, 1988 regarding supervisory duties imposed upon each chair. While it is true that newly adopted job descriptions in 1988 require incumbents to hold an appropriate New Jersey "administrative certificate", the major emphasis of each department chair position is the supervision of department staff. To the extent Subchapter 10 of Chapter 11 of Title 6 of the New Jersey Administrative Code (N.J.A.C. 6:11-10.1 et seq.) authorizes the issuance of various "administrative" certificates, (school administrator, principal, school business administrator, assistant superintendent for business) the 1988 job descriptions do not specify which of the several administrative certificates are required for department chair. Nevertheless, the focus of the department chair position is supervision of staff, not administrative duties in the sense of managing a school building as a principal does or managing a school district as does a superintendent and, furthermore, it is stipulated that each named petitioner possesses not only a supervisor's certificate but the administrative certificate as principal.

This concludes a recitation of all relevant facts.

ARGUMENTS

I
Petitioners

Petitioner MacMillan, noting that she served the Board as department chair-English from February 1978 through June 1988, maintains she acquired a tenure status of employment through such service in the position of supervisor because she was obligated

to possess a supervisor's certificate and was obligated to and did supervise teachers; that the department chair-English position created by the Board on September 1, 1988 is the same position in which she acquired tenure; that by virtue of her possession of the administrative certificate of principal, her possession of a supervisor's certificate, and her possession of the instructional certificate for the teaching of English coupled with her possession of master's degree in English education, she is qualified for the department's chair-English (8-12) position created by the Board as of September 1, 1988; and, that by virtue of her tenure status as department chair-English and her qualifications for the position as created by the Board September 1, 1988 she has a legally enforceable tenure claim to the position over Richard Pincus who does not have the legislative status of tenure either as a supervisor or in any other position in the Board's employ. Petitioner MacMillan and all other petitioners rely in support of their arguments upon Capodilupo v. West Orange Board of Ed., 218 N.J. Super. 510 (App. Div. 1987) and Bednar v. Westwood Board of Ed., 221 N.J. Super. 239 (App. Div. 1987).

Petitioner Zambrowski, noting that he served the Board as department chair-science from September 1980 through June 1988, maintains that he acquired a tenure status of employment through such service in the position of supervisor because he was obligated to possess a supervisor's certificate and was obligated to and did supervise teachers. Zambrowski then repeats the very same arguments advanced by Petitioner MacMillan in support of his argument that he has a legally enforceable claim to the department chair-science (8-12) position created by the Board September 1, 1988 by virtue of his tenure as supervisor over George Penfield whose tenure claim is limited to the position of teacher. Zambrowski notes that he is qualified for the department chair (8-12) position by virtue of his possession of an instructional certificate in the teaching of science and in his possession of the administrative certificate as principal and in his possession of a supervisor's certificate.

Petitioner Rodgers, noting that he served the Board as department chair-computer studies from September 1, 1984 through June 30, 1988, maintains that he acquired a tenure status of employment through such service in the position of supervisor because he was obligated to possess a supervisor's certificate and was obligated to and did supervise teachers. Petitioner Roberts repeats the same arguments advanced by Petitioners MacMillan and Zambrowski in support of their superior tenure claim to the

respective department chair positions they seek. Nevertheless, in this instance the controverted department chair position of mathematics/computer studies (8-12), remains vacant. Consequently, the claim of Rodgers is not that the Board filled the position to which he claims a tenure status with a non-tenure person; rather, he contends that by virtue of his qualifications in both the subject area of science and mathematics he is entitled by virtue of his tenure status to the position of department chair-science, which in legal effect is that as a supervisor, in the event Petitioner Zambrowski refuses to accept that position and, in fact, he is entitled by a combination of his tenure as supervisor in the position department chair-computer studies and his qualification as a teacher of mathematics to the position department chair-mathematics/computer science should the Board elect to fill such position. It is recalled from stipulation of fact 18, ante, Rodgers possesses an instructional certificate as a teacher of science-secondary and as a teacher of mathematics-secondary, along with being in possession of an administrative certificate as principal and the supervisor's certificate.

Petitioner Walldov, noting that he served the Board as department chair-mathematics from September 1, 1966 through June 30, 1984 and, following litigation, from September 1, 1987 through June 30, 1988 maintains that he acquired a tenure status of employment through such service in the position of supervisor because all such department chair positions were positions as supervisor. Therefore, Petitioner Walldov, while acknowledging that the Board has the option whether to fill the position of department chair-mathematics/computer science, contends that if it so determines to fill that position and if Petitioner Rodgers is not appointed thereto, then he has a legally enforceable claim to such position.

In summary, Petitioner MacMillan prays to be reinstated to the position of department chair-English, (8-12); Petitioner Zambrowski prays for reinstatement as department chair-science, (8-12); Petitioner Rodgers prays for appointment to the position department chair-science (8-12) in the event Zambrowski is not appointed thereto and if Zambrowski is so appointed then Rodgers prays for appointment to the position department chair-mathematics/computer studies (8-12); and, Petitioner Walldov prays for appointment to the position department chair-mathematics/computer science in the event Petitioner Rodgers is not appointed thereto.

II

Board

The Board contends that each of petitioners' claims of a tenure right to the controverted department chair positions, 8-12, in each of the subject matter areas be dismissed on the grounds each petitioner served in a department chair position of responsibility in, at best, grades 7 through 9, and not as department chairs, grades 8 through 12. The Board, in its memorandum filed, acknowledges the state of existing law as follows:

> Thus, in order to achieve a tenure status, the teaching staff member must have actually served the requisite statutory period in a position which is consistent with the endorsement on the certificate possessed by said teaching staff member.

The Board, noting that petitioners base their tenure claim on the fact that since all department chair positions required and require a supervisor's certificate each therefore are tenured as supervisors and may displace non-tenured supervisors, contends that the essential difficulty with petitioners' theory of the case is that unlike the instructional certificate which requires an appropriate endorsement in order to define the "position" in which an employee must serve to acquire tenure, the administrative and supervisory certificate, even with the supervisor endorsement, qualifies the holder to assume a vast number of positions with widely varying titles and responsibilities.

Next, the Board contends petitioners have no seniority entitlement to the department chair position created as of September 1, 1988. But, it must be noted that petitioners' arguments center primarily upon a tenure claim to existing department chair positions created as of September 1, 1988 and only secondarily upon a claim of superior seniority. Finally, the Board contends Petitioner Walldov has not acquired a tenure status as a supervisor because he served as department chair-mathematics with the proper supervisor's certificate for only one school year in 1983-84. It notes that in the litigation between Walldov and the Board referred to in stipulation 19, ante, the Commissioner's decision was really based upon an "inartfully drawn" stipulation which it had entered. Nevertheless, the Board does acknowledge that the Commissioner did determine that Petitioner Walldov was entitled to reinstatement to the position of department chair-mathematics as of September 1, 1984 together with "* * * any differential in salary, benefits, and emoluments that may have arisen as a result of improper denial of said positions." (Commissioner's slip opinion, p. 23).

ANALYSIS

Initially, it is noted that the title "department chairperson" is not a recognized title in State Board of Eduction rule, N.J.A.C. 6:11-1.1 et seq. It is further noted that the State Board rule, N.J.A.C. 6:11-3.6(a), requires that "district boards of education shall assign position titles to teaching staff members which are recognized in these rules." The rule goes on to admonish boards that if the use of an unrecognized position title is desirable to seek written request of the county superintendent of school for permission to use the proposed title so that the county superintendent may make a determination of the appropriate certification necessary for the position and to determine the position's appropriate title.

While there is no evidence in this case that this Board sought the prior approval of the county superintendent for its use of the position titled department chairperson, it is recognized that the stipulations acknowledge the Board did in fact require a supervisor's certificate to be possessed by department chair incumbents and that department chair incumbents did in fact supervise teachers. Under a prior decision of the Commissioner in Freehold Regional High School Education Association et al. v. Freehold Regional High School District Board of Ed., 1978 S.L.D 960, 965, boards of education were reminded "* * * that the minimum of either a supervisor's or principal's certificate must be held by an individual assigned to supervise the performance of teaching staff members."

In Furst v. Rockaway Township Board of Ed., 1984 S.L.D. _____, aff'd State Board of Ed., 1984 S.L.D. _____ (Oct. 24), Commissioner in addressing the use of the unrecognized title computer specialist/L.D.T.C., held that Furst's "* * * tenure and seniority * * * must be attached to the L.D.T.C. position, a recognized, tenurable position." So, too, here. Tenure must attach to the recognized positions held by each petitioner which is that of supervisor.

Each petitioner, as department chairperson in possession of a supervisor's certificate each of whom were obligated to supervise teachers, held the recognized title of supervisor under State Board of Education rules. (See N.J.A.C. 6:11-10.9) Each petitioner, therefore, having served the requisite period of time under N.J.S.A. 18A:28-5 and/or 18A:28-6, acquired a tenure status of employment with the Board in the position of supervisor. Despite the Board's argument, petitioner Walldov did acquire a tenure status of employment as a supervisor by virtue of his possession of a supervisor's certificate as

of August 1983 and in light of the fact that he served as department chair-mathematics for 1983-84. Furthermore, the Commissioner ordered him reinstated to the position department chair-mathematics as of September 1, 1984 with all benefits and emoluments which may have arisen as the result of the Board's improper denial of said position. Therefore, Walldov must be granted as time served in the position the years 1984-85, 1985-86, 1986-87, and 1987-88. Under N.J.S.A. 18A:28-5, such time served is more than enough to have acquired a tenure status in the position of supervisor.

As noted by petitioners in their filed memorandum, there is a distinction between tenure and seniority. Tenure is a legislative status, not acquired in any specific assignment, but in the "position" enumerated in N.J.S.A. 18A:28-5. N.J.S.A. 18A:28-5 provides in part that "the services of all teaching staff members including all teachers * * * and such other employees as are in position which require them to hold appropriate certificates issued by the board of examiners * * *". In this case, the Board determined that the appropriate certificate to be held by each petitioner is that of a supervisor. Consequently, petitioners having served more than the requisite period of time to acquire tenure, acquired such a legislative status in the position of supervisor.

Seniority, on the other hand, applies only to certain rights of tenured employees and only has meaning when a reduction in force is involved. Here, all petitioners have tenure as supervisors in the employ of the Board, but their seniority is limited to their respective assignments. Thus, while Petitioner MacMillan has tenure as a supervisor in the Board's employ, she has enforceable seniority to the category of supervisor-English; Petitioner Zambrowski has tenure in the position of supervisor, but an enforceable seniority claim in the category of supervisor-science; Petitioner Rodgers has tenure in a position of supervisor, but enforceable seniority in the category of supervisor-computer studies; and, Petitioner Walldov has tenure in the position of supervisor, but enforceable seniority in the position of supervisor-mathematics. Nevertheless, petitioners' claims herein are anchored upon their legislative status of tenure.

In Bednar v. Westwood Board of Ed., supra, a tenured art teacher was dismissed as the result of a reduction-in-force. The board chose to retain a non-tenured art teacher in a "category" in which Bednar did not have seniority. In spite of his lack of seniority, Bednar claimed that his rights of tenure gave him a greater entitlement to the position than did the non-tenured holder of the position. The Bednar court reaffirmed the

principles announced in the matter of Capodilupo v. West Orange Board of Ed., supra, that a tenured teacher is entitled to retain his position over a non-tenured teacher. However, the Bednar court further stated that even if a board had sound educational reasons for employing a non-tenured teacher those reasons as a matter of policy could not be used to dilute the statutory rights of a tenured teaching staff member. The court held in part as follows:

> Tenure is created by a statute, N.J.S.A. 18A:28-1 et seq., which should be liberally construed to further its beneficial purpose of affording security to teaching staff who meet its standard of length of service [citation omitted].
>
> One of the provisions of the tenure law is N.J.S.A. 18A:28-9, which states in essence that tenure does not limit the right of a school district to reduce staff. The next section, N.J.S.A. 18A:28-10, states that, in a RIF, dismissals shall be made on the basis of seniority according to standards adopted by the State. N.J.S.A. 18A:28-13 instructs the Commissioner how to create those standards. N.J.S.A. 18A:28-12 gives staff who are dismissed in a RIF preference in reemployment.
>
> The tenure statute authorizes the creation of seniority regulations to rank the job rights of tenured teaching staff in a RIF [citations omitted]. The statute does not create or authorize the Commissioner to create competing rights for non-tenured teachers * * *
>
> The State Board of Education attempted to fairly resolve a tension it perceived between tenure and seniority. The State Board's solution [in Bednar] was to rule that tenure does not permit a teacher to claim an assignment in a job category in which he has no seniority against a non-tenured teacher with experience in the category. The Board cited N.J.S.A. 18A:28-10, which invokes seniority to determine job rights in a RIF, and reasoned that since Bednar had no seniority teaching art on a secondary level, his rights were not violated by reducing his hours while retaining a full-time non-tenured secondary art teacher.
>
> The defect in the Board's approach is this. N.J.S.A. 18A:28-10 declares only the rights inter sese of tenured teachers in a RIF. Among them, seniority is determinative. But, the statute does not authorize regulatory dilution of tenure rights by affording a non-tenured teacher 'seniority.' The tension perceived by the State Board between tenure and seniority is one the Board created. Its only proper resolution is to rule that the rights conferred by the tenure statute may not be disolved by implementing regulations * * *
>
> (221 N.J. Super. at 241-243)

In this case, Petitioners MacMillan and Zambrowski clearly have a tenure claim to the respective positions of department chair-English and department chair-science for they have acquired a tenure status in those respective positions as supervisors and they are qualified to hold the positions as created by the Board September 1, 1988. The present incumbents in those positions do not possess a tenure status in the Board's employ as supervisor. Therefore, the claims of MacMillan and Zambrowski to those positions are legally enforceable. Neither Pincus nor Penfield have a legally enforceable claim under the tenure laws to those positions.

Petitioner Rodgers has a legally enforceable tenure claim to the position of supervisor in the Board's employ. In his case, he is qualified to be a supervisor in both mathematics and science. Consequently, if Petitioner Zambrowski chooses to refuse to return to the Board's employ as supervisor of science, then by virtue of the seniority accrued by Rodgers he would be entitled to the position of supervisor-science. Furthermore, Petitioner Rodgers is qualified to be supervisor of mathematics/computer studies by virtue of his past teaching experience and by virtue of the certificates possessed. Thus, if the Board determines to fill the position of department chair-mathematics/computer literacy its first offer must be made to Petitioner Rodgers.

Petitioner Walldov, on the other hand, has an enforceable tenure claim as a supervisor in the Board's employ. Nevertheless, I find no basis in this record upon which to conclude he would have a claim to the position of department chair-mathematics/computer studies because he presents no qualifications in computer studies as required by the Board in its adopted job description (E-1). Consequently, even if the Board decides to fill the position of department chair-mathematics/computer science, it cannot be said on this record that Petitioner Walldov has a claim for such appointment.

SUMMARY

Based on the foregoing analysis of the law, as applied to the facts in this case, I **CONCLUDE** that Petitioner MacMillan is entitled to appointment to the position of department chair-English as of September 1, 1988; that Petitioner Zambrowski is entitled to appointment to the position of department chair-science as of September 1, 1988; and, that Petitioner Rodgers is entitled to the position of department chair-science should Zambrowski refuse the Board's offer and, if not, then Petitioner Rodgers is entitled to the

position department chair-mathematics/computer studies as of September 1, 1988. I further **CONCLUDE** that Petitioner Walldov failed to present sufficient evidence in this record to establish he has a claim to the position of department chair-mathematics/computer studies by virtue of the absence of qualifications submitted here regarding computer studies.

Petitioners MacMillan and Zambrowski are also entitled to back pay, if any, representing the difference between their salaries received and the salaries they should have received from September 1, 1988 forward as supervisors, together with all other benefits, and emoluments of such employmemt otherwise withheld from them. Zambrowski's back pay, if any, together with benefits and emoluments would cease as of the date his resignation from the employ of the Board was effective if he declines the Board's offer of reinstatement. That resignation, it is noted, has no effect upon Zambrowski's legal claim against the Board regarding its improper replacement of him September 1, 1988 with a non-tenured supervisor.

I **FIND** no basis in this record upon which to award Petitioner Rodgers back pay, or back benefits or emoluments because it cannot be said here that Zambrowski would have refused appointment to the position of department chair-science September 1, 1988 which, in turn, would then have constituted a claim to that position by Rodgers. Rather, more likely than not, had the Board honored Zambrowski's tenure claim as supervisor in its employ September 1, 1988 he would have accepted it. There is no authority to compel the Board to have filled the position of department chair-mathematics/computer studies.

The claim of Petitioner Walldov must be and is **DISMISSED.**

A final note. This case addresses only those claims as advanced by petitioners. Whether the Board has in its employ others with a tenure status as supervisor and thus some seniority is not now relevant because of their failure to file a Petition of Appeal. Polaha v. Buena Vista Regional School District, 212 N.J. Super. 628 (App. Div. 1986).

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

November 17, 1989
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

Nov. 20, 1989
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 27 1989
DATE

Jaynee LaVecchia/K.S
OFFICE OF ADMINISTRATIVE LAW

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LAURA MAC MILLAN, LAWRENCE ZAMBROWSKI, ROBERT RODGERS AND RICHARD WALLDOV,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by Petitioner Walldov and by respondent (hereinafter "the Board").

Petitioner Walldov takes exception only to those aspects of the initial decision pertaining to himself and to Petitioner Rodgers, and to the latter only on the question of back pay and emoluments. Regarding his own situation, Petitioner Walldov argues that his tenure as a supervisor is undisputed, this matter having already been disposed of in Richard Walldov et al. v. Bd. of Ed. of East Brunswick Township, Middlesex County, decided by the Commissioner May 10, 1985, aff'd State Board November 6, 1985, dismissed N.J. Superior Court Appellate Division February 26, 1986. Further, he argues, the Board did not previously raise the issue of his qualifications for the position of Chairperson of Mathematics/ Computer Studies, and should not now be permitted to do so as a defense to what has consistently been purely a tenure entitlement claim. The proper resolution, he contends, is a finding that he is entitled to the Mathematics/Computer Science position in the event that it is filled by the Board but not taken by Petitioner Rodgers; however, if the issue of his qualifications should be deemed pertinent, this specific matter should be remanded for a hearing.

With regard to Petitioner Rodgers, Petitioner Walldov concurs that Rodgers' entitlement to the position of Chairperson of Science hinges on its not being filled by Petitioner Zambrowski. He also argues, however, that should Zambrowski elect not to take the position, Rodgers' entitlement extends to the date of Zambrowski's resignation from the district, February 13, 1989. Accordingly, if the position falls to Rodgers, he should also be entitled to back pay and emoluments from that date.

The Board, on the other hand, essentially argues against the ALJ's finding that petitioners were tenured as supervisors by drawing a distinction between the position held and the certificate required to hold it. For purposes of tenure, asserts the Board, the

position held is either one of those specifically enumerated in N.J.S.A. 18A:28-5 or one created by the Board within the statutory and regulatory parameters governing certification and endorsements. Each Supervisor of Instruction position, the Board argues, is a separate and distinct position with its own set of qualifications and endorsements, and tenure accrues to each unique position rather than to all positions within the scope of the supervisory endorsement. Thus, when one unique supervisory position is abolished, its incumbent has no tenure entitlement to the newly established supervisory position, likewise unique, developed to replace it. In the instant matter, the Board contends, there can be no question of the substantial differences between the abolished positions and the new ones, particularly in the case of the newly consolidated Chairperson of Mathematics/Computer Studies position. Moreover, asserts the Board, in cases (nine cited, included Walldov, supra, dating from 1980 through January 1987) where old positions have been demonstrated to be substantially different from new, the Commissioner has regularly held that riffed staff have no seniority rights to the new positions, even in those cases where the newly appointed person was nontenured. Thus, all signs point to petitioners having no entitlement to the new Chairperson positions and to the Board having acted carefully and in accord with applicable law.*

Upon a careful review of this matter, the Commissioner affirms the initial decision of the ALJ, with modification, for the reasons stated herein.

In the wake of Capodilupo, supra, and Bednar, supra, the Commissioner has consistently maintained that, with unrecognized titles, the scope of a position for purposes of tenure entitlement is that of the endorsement(s) required to hold it; so that in the instant case, all petitioners (including Walldov) are tenured as supervisors rather than as department chairpersons in the limited sense defined by the Board. As such, they are entitled to displace nontenured incumbents in any positions, other than those listed as separately tenurable under N.J.S.A. 18A:28-5, requiring the supervisory endorsement regardless of their specific duties and other qualifications. Accordingly, the Commissioner concurs with the ALJ regarding the entitlements of Petitioners MacMillan, Zambrowski and Rodgers. He cannot, however, agree with the initial decision regarding Petitioner Walldov, who by virtue of his tenure as supervisor must be found to be second in entitlement (after Rodgers) to the mathematics/computer chair if that position is filled by the Board. The specific qualifications in computer training relied on by the ALJ to dismiss Walldov's claim go beyond those established by State certification rules and thus cannot be

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* The Board also objects, although the matter does not impact on the substance of the case, to the ALJ's implication that the Board did not make proper application for the use of unrecognized titles to the County Superintendent of Schools (Initial Decision, at p. 15). Documentation is appended to the exceptions to demonstrate that such application and approval did in fact take place.

used by the Board to thwart the employment rights of a tenured teaching staff member (cf. South River Education Association et al. v. South River Bd. of Ed., Middlesex County, State Board of Education decision November 4, 1987.)

Neither can the Commissioner agree with the ALJ's determination regarding back pay and emoluments for Petitioner Rodgers, given that, if Rodgers takes the science chairperson position, it would be by virtue of an entitlement dating from Zambrowski's resignation. If back pay and emoluments accrue from date of entitlement, as the Commissioner generally holds that they should and as the ALJ holds with regard to the other petitioners in this matter, then Rodgers' rights should not be curtailed solely because Zambrowski might not have resigned had he been offered the science chair.

Seniority issues, as the ALJ notes, are not relevant to the central claims here, as they pertain only to RIFs among tenured teachers inter sese and not to the rights of tenured staff to positions held by nontenured employees. Moreover, the cases cited by the Board in support of its contention that seniority claims to newly established positions, including positions held by nontenured staff, have been frequently denied by the Commissioner based on differences in duties and qualifications other than certification, were rendered prior to Capodilupo and Bednar (decided by the Appellate Division July 2, 1987 and November 24, 1987, respectively) and are in several instances diametrically opposed to the principles of tenure protection embodied in those later, now controlling cases.

Accordingly, the Commissioner concurs that Petitioner MacMillan is entitled to the English chairperson position as of September 1, 1988, with back pay and emoluments from that date forward, and that Petitioner Zambrowski is similarly entitled with regard to the science chair. While he concurs that Petitioner Rodgers is entitled to first offer of the mathematics/computer chair and to the science chair if that position is refused by Zambrowski, the Commissioner modifies the ALJ's determination to provide that should the science chair fall to Rodgers, back pay and emoluments shall be due from February 13, 1989. Finally, the Commissioner modifies the ALJ's determination to hold that Petitioner Walldov is entitled, by virtue of his supervisory certificate, to the mathematics/computer studies position if filled by the district and rejected by Rodgers.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

LAURA MAC MILLAN, LAWRENCE ZAMBROWSKI, ROBERT RODGERS AND RICHARD WALLDOV,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF EAST BRUNSWICK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, January 4, 1990

For the Petitioners-Respondents, Robert M. Schwartz, Esq.

For the Respondent-Appellant, Pachman & Glickman (Martin R. Pachman, Esq., of Counsel)

The Commissioner of Education rendered his decision in this case on January 4, 1990, holding that Petitioners, four tenured teaching staff members, had entitlement to supervisory positions following a reorganization in the district. The Board appealed to the State Board of Education, filing its appeal on February 15, 1990, by regular mail delivery on February 16. See N.J.A.C. 6:2-1.6.

Pursuant to N.J.S.A. 18A:6-28, appeals to the State Board must be taken "within 30 days after the decision appealed from is filed." The State Board may not grant extensions. N.J.A.C. 6:2-1.5(a). In contrast to the period for filing petitions to the Commissioner of Education, see N.J.A.C. 6:24-1.2; N.J.A.C. 6:24-1.17, the time limit within which an appeal must be taken to the State Board is statutory, and, given the jurisdictional nature of the statutory time limit, the State Board lacks the authority to extend it. E.g., B.W., a minor child by his parents, J.W. and B.W. v. Board of Education of the City of Brigantine and Safety Bus Service, decided by the State Board, November 4, 1987.

In this case, the Commissioner's decision was rendered on January 4, 1990 and mailed to the parties on that date. Accordingly, pursuant to N.J.A.C. 6:2-1.4, the decision appealed from was filed on January 7. Therefore, as mandated by N.J.S.A. 18A:6-28, see N.J.A.C. 6:2-1.3(a); N.J.A.C. 6:2-1.4(a), as computed under N.J.A.C. 6:2-1.4(b), the Board was required to file notice of appeal by February 6, 1990. As noted, the Board did not file by that date. Accordingly, the matter was referred to our Legal Committee for consideration of the effect of the Board's failure to file timely notice.

On March 19, 1990, in response to notice of the referral, the Board's counsel filed a motion to file notice of appeal nunc pro tunc.[1] The Board's counsel asserted in a certification attached thereto that, upon receipt of the Commissioner's decision, he had entered into settlement discussions with Petitioners' counsel, but that two of the Petitioners could not be located so as to ascertain their positions on a proposed settlement offer. The Board's counsel certified that those Petitioners were not located until after the time for filing an appeal had passed, and, when they declined to accept the offer, the instant appeal followed.

After considering the circumstances as presented by the Board's counsel, we conclude that his failure to file the appeal within the statutory time limit as computed under the applicable regulations was not excusable, and that the requirement with which the Board's counsel failed to comply was of such significance that we dismiss the appeal in this matter. See Helen Yorke v. Board of Education of the Township of Piscataway, decided by the State Board of Education, July 6, 1988, aff'd, Docket #A-5912-87T1 (App. Div. 1989) (dismissal of appeal by State Board upheld where Appellate Division found notice of appeal to have been filed one day late).

The fact that the parties were engaged in settlement negotiations or that two of the Petitioners could not immediately be located does not excuse the Board's counsel from timely compliance with the statutory time limit. The notice of appeal was required to be filed by February 6, 1990, yet was not filed until February 15 when, as the Board's counsel asserts, those two Petitioners were located but declined to accept the settlement offer. Notwithstanding the circumstances herein presented, the Board's counsel was obligated to file a notice of appeal in a timely manner in order to preserve the Board's rights. Settlement efforts could certainly have continued thereafter.

Accordingly, we deny the Board's motion and dismiss its appeal for failure to file notice thereof within the statutory time limit as computed under the applicable regulations.

April 4, 1990

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[1] We note that the Board's motion, as originally filed, did not conform to the requirements of N.J.A.C. 6:2-1.18 for the filing of motions. On March 28, 1990, the Board's Counsel filed a letter brief in support of the motion, in which he restated the circumstances expressed in his certification filed with the motion.

Pending N.J. Superior Court

THE CITY OF JERSEY CITY et al.	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY, AND THE STATE OF NEW JERSEY,	:	DECISION
RESPONDENTS.	:	

For the Petitioners, Robert M. Schwartz, Esq.

For the Respondent State-Operated School District of the City of Jersey City, Murray, Murray & Corrigan (Karen A. Murray, Esq., of Counsel)

For the Respondent State of New Jersey, Peter N. Perretti, Jr., Attorney General of New Jersey (Nancy Kaplen Miller, Deputy Attorney General)

This matter has arisen before the Commissioner of Education by way of Petition of Appeal with Motion for Interim Relief filed on October 5, 1989, followed by an amended petition filed October 16, 1989 by counsel for petitioners, Robert M. Schwartz, Esq., challenging the State District Superintendent of Jersey City's right to incur payment by the district of sixty days pay to any individuals such as those executive administrators responsible for curriculum, business and finance and personnel, whose positions were abolished upon the creation of the State-operated School District pursuant to N.J.S.A. 18A:7A-44(c). Further, petitioners submit that any such "severance" payments to any similarly situated individuals, as well as all litigation costs associated with the implementation of the legislation providing for State-operated school districts, should be paid by the State, not by the local school district. Petitioners aver that the contention of the State-operated School District, which claims that all such expenses incurred as a result of State take-over are local district expenses, is ultra vires because such position is not supported by statute, regulation, case law or evidence in the legislative intent behind the statute creating State-operated school districts. Petitioners seek a stay of any such disbursements from the local coffers, claiming they have met the standards for judging an application for injunctive relief as set forth in such case law as Crowe v. De Gioia, 90 N.J. 126 (1982). Petitioners seek to have the Commissioner enjoin the local district from expending those monies mentioned above noting that the matter is one of first impression.

In so claiming, petitioners aver that the statutory provisions governing State-operated school districts only provide that the salary of the superintendent and those appointed pursuant

to the act are to be an expense of the local school district budget.

> ***[W]hile petitioner accepts the responsibility to provide the necessary funding of the state-operated school district for the purpose of the salary of the State District Superintendent and the salaries of all persons appointed pursuant to the Act, it does not accept the responsibility of having to fund the expense of providing the equivalent of sixty days pay to all individuals displaced as a result of the creation of the state-operated school district or any judgment, award or settlement obtained by any litigant contesting the authority given to the state-operated school district or the concomitant litigation costs.***
> (Petitioners' Letter Memorandum, at pp. 3-4)

They submit that funding of any expenses not specifically or inferentially authorized or sanctioned by the statutes in question must be the responsibility of the State. They cite, inter alia, State v. McGuire, 84 N.J. 508 (1980) for the proposition that a court or administrative agency must effectuate legislative intent in light of the language used and the objects sought to be achieved. They also cite Borough of Park Ridge v. Salimone, 21 N.J. 28 (1956) for the proposition that where there are two possible constructions of a statute, that which most closely effectuates the legislative policy must control.

Finally, petitioners note the Commissioner's recent Order that the Jersey City District's total expenditures for the 1989-90 fiscal year be increased from 186 million dollars to 197.3 million dollars. They claim:

> With the fiscal requirements being what they are, and with the local district's ability to meet those requirements limited by the tax assessment set into place prior to the Commissioner's order to increase the budget, it stands to reason that the local school district budget should not be made to bear expenses not authorized by the statute and which would not have been incurred except for the administrative order issued by the State Board of Education on October 4, 1989.
> (Petitioners' Letter Memorandum, at p. 6)

On October 19, 1989 Dr. Seymour Weiss, Director of the Bureau of Controversies and Disputes, State Department of Education, apprised the parties that inasmuch as the issue which petitioners raise is strictly a legal one requiring an interpretation of N.J.S.A. 18A:7A-34 et seq., the Commissioner would retain the matter for decision on the merits, thus, precluding the necessity for a hearing or a determination relative to petitioners' request for stay.

On November 27, 1989, the Attorney General of New Jersey, Nancy Kaplen Miller, Deputy Attorney General, on the Brief, filed an

Answer to the Amended Petition of Appeal dated October 16, 1989 and Brief on behalf of the State of New Jersey. Also on November 27, 1989, the State-operated School District of the City of Jersey City, as co-respondent, filed a letter memorandum in opposition to the Petition of Appeal. With consent of the co-respondent, the State-operated School District adopted the State's reply brief in its entirety and joined the State in making its arguments to those issues raised in the Amended Petition. To the State's arguments, the State-operated School District responds to Paragraph C in the conclusion of petitioners' letter memorandum dated November 6, 1989 wherein it is stated:

> Any judgments or awards against the state operated school district or any monetary settlement entered into by the state operated school district be an expense of the state and not be incurred as an expense of the local school district budget.

The State-operated School District of Jersey City submits that:

> ***Petitioner's third demand far exceeds that of Paragraph B, which relates to the cost litigation arising out of the creation of the State-Operated School District. An order requiring the State to fund <u>any</u> judgments or awards against the State-Operated School District or settlement entered into by said District arguably covers all of the pending litigation, initiated against the Board of Education of the City of Jersey City, and now assumed, as a matter of law by the successor to the Jersey City Board, namely, the State-Operated School District. (emphasis in text)
> (State-Operated School District of Jersey City's Letter Memorandum, dated November 27, 1989, at p. 2)

The co-respondent claims that petitioners' third demand is so broad that, if accepted, all pending and future litigation would become the responsibility of the State. It claims such a demand has no basis in statute and must be dismissed.

The Reply Brief on Behalf of the State of New Jersey claims the central issue in this matter is to determine who is responsible for the cost of "severance pay" in lieu of notice, as well as possible litigation costs arising out of the abolition of positions related to the reorganization of the local school district's central administrative and supervisory staff. (State's Reply Brief citing Petitioners Letter Memorandum, at p. 3) It first submits that if Jersey City were a Type I or Type II district, the local district would be responsible for such costs. In rebuttal to petitioners' contention that as a State-operated school district, the State should be held responsible for those costs, the State contends the Legislature did not address responsibility for those costs in the legislative scheme regarding creation of a State-operated district. Thus, it avers, the only reasonable interpretation of that scheme is

that it did not alter the local district's responsibility for these types of expenses and, therefore, that the Petition of Appeal should be dismissed.

More specifically, the State takes issue with petitioners at page 5 of their Letter Memorandum wherein they claim that to decide against them would mean that "the local school district budget would be used to fund or to subsidize what until now has been an expense and a burden of the state." The State submits that this argument is based on an erroneous premise, since the types of expenses at issue have never been a burden or expense of the State but rather are typical local district expenses. It cites Robinson v. Cahill, 69 N.J. 449, 462 (1976) in support of the proposition that the State meets its responsibility for assuring adequate funds for the provision of a thorough and efficient education by requiring local school districts to budget for a thorough and efficient education. It contends further that "[w]hether the requirement for notice -- or payment in lieu of notice -- derives from statute, contract or simply concepts of 'rudimentary fairness', the local district is the entity responsible for payment.***" (State's Reply Brief, at pp. 9-10) It cites Old Bridge Township Board of Education v. Old Bridge Education Association, 98 N.J. 523, 532-33 (1985) (teacher denied timely notice as required by contract entitled to compensation for the number of days of late notice); Page v. Board of Education of the City of Trenton, 1973 S.L.D. 704; and Armstrong v. East Brunswick Township Board of Ed., 1975 S.L.D. 117, aff'd New Jersey Superior Court, Appellate Division 1976 S.L.D. 1104 (nontenured teacher denied timely notice as required by statute entitled to sixty days pay).

The State further argues that the fact that the abolition of the positions in question were legislatively abolished rather than abolished at the choice of the district does not alter the local responsibility for the costs. "Where the school laws mandate the creation of certain positions or the provision of various programs and services, the State is not required to fund the expenses of those mandates. See, e.g., N.J.S.A. 18A:7A-7; N.J.S.A. 18A:7A-11; N.J.S.A. 18A:7C-3; N.J.S.A. 18A:35-1 et seq; N.J.S.A. 18A:40-4; N.J.S.A. 18A:40A-10; N.J.S.A. 18A:46-6 et seq." (State's Reply Brief, at pp. 10-11) It also points to the fact that the cost of correcting district deficiencies detected through the monitoring process is a local district expense, although it can receive current-year funding for additional revenues needed to implement a corrective action plan. The State does not directly fund such expenses, the State argues, citing N.J.S.A. 18A:7A-14.

It is the State's position that the legislation providing for a reorganization following the creation of a State-operated school district should be interpreted no differently from Type I or Type II legislation.

> The State mandate of a reorganization, including position abolitions, merely demonstrates a legislative determination that such a local reorganization is essential to correcting the district's systemic deficiencies; it does not demonstrate a legislative intent to convert the

costs of the reorganization into a direct State expense. (Id., at p. 11)

The State elaborates on this position by stating:

> The conclusion that the Legislature did not intend to alter the local nature of these costs is consistent with the language of the act providing for the creation of a State-operated school district.*** N.J.S.A. 18A:7A-34 et seq. Where the Legislature intended to alter the responsibility for an expense, the legislation explicitly addresses the issue. Thus, in creating an internal audit team to monitor the business functions of the district -- presumably a local responsibility -- the statute alters the local nature of the cost by explicitly stating that the audit team will be funded directly by the State. See N.J.S.A. 18A:7A-41. Furthermore, where the nature of the expense might create confusion, the Legislature also specifically stated who was financially responsible. The statute specifically provides that the State district superintendent is to be appointed by the State Board and is a state officer for tort claims purposes, thus the salary might be considered a State expense. To avoid any confusion, the Legislature explicitly stated that the salary was to be paid by the local district. (Id., at p. 12)

The State contends that without any specific legislative direction, all other expenses must be presumed to remain local district expenses as part of the local school budget, with the State contribution made through the State aid to the district based on that budget. "Unless the legislation is explicit, the Act should not be read to convert otherwise local district expenses which are state aided through the district's budget to direct state expenses simply because the local district is now State-operated.***" (Id., at p. 13)

The State concludes that it is in accord with petitioners that "a Court must interpret and enforce the legislative will as it is written and not, according to some supposed unexpressed intention or presumption that the Legislature intended something more than what it actually wrote into law." (Id., quoting Petitioners' Letter Memorandum dated November 6, 1989, at p. 4) The State avers, however, that petitioners in this matter are violating that precept without any legislative indication to do so.

> The local school district budget in each district, including a State-operated school district is intended to reflect all local district expenses. Those expenses include severance pay to employees and litigation costs associated with dismissal of employees. The state contribution to those costs

> is to be paid to the school district based on its budget through the state-aid formula.***
> (Id., at pp. 13-14)

The State suggests that if such expenses create an unreasonable tax burden on the city, the legislation for State-operated school districts provides an avenue for additional state aid to the district, citing N.J.S.A. 18A:7A-52. In the absence of any such legislative language relating to any local district employees at issue herein being directly paid by the State, the State claims that this forum should not create such an obligation but rather should dismiss the Petition of Appeal.

Upon a careful review of the papers and statutes in question, the Commissioner finds that the legislation creating State-operated school districts does not address responsibility for costs of "severance" pay for those employees whose central administrative or supervisory positions were abolished in the reoganization of the Jersey City Schools pursuant to N.J.S.A. 18A:7A-34 et seq. The Commissioner further finds that the legislative scheme regarding the creation of State-operated school districts did not envision nor address the State's assuming costs relative to litigation arising out of creation of a State-operated school district. The Commissioner's review of the statutory scheme comports with the State's that N.J.S.A. 18A:7A-34 et seq. did not alter the local district's responsibility for these types of expenses, in the same way that any Type I or Type II district would be held responsible for such ministerial expenses.

The Commissioner would first observe that contrary to petitioners' premise, a State-operated school district functions in all manners similarly to Type I and Type II school districts, except by legislative directive to the contrary. In this regard it must be observed that petitioners labor under a misperception in claiming that "the statute [N.J.S.A. 18A:7A-34 et seq.] does not provide for the aforementioned cost [of compensating administrative and supervisory staff whose positions have been abolished as a result of a state reoganization] to be an expense of the local school district" and that "***any other interpretation would effectively mean that the local school district budget would be used to fund or to subsidize what until now has been an expense and a burden of the state." (Petitioners' Letter Memorandum, at p. 5) Rather, it is well established that local districts budget for such contingencies. See, e.g., Old Bridge Township Board of Education, supra.

The extant statutory formula provides for arriving at figures for compensation and award of salary which includes disbursing sixty days compensation where timely notice of termination is not provided. See N.J.S.A. 18A:27-10,11 and N.J.S.A. 18A:28-8. See also Arthur L. Page v. Board of Education of the City of Trenton, et al., 1973 S.L.D. 704, aff'd State Board 1974 S.L.D. 1416. As noted by the State in its Reply Brief at page 10:

> In Page, the Commissioner found that considerations of fairness require that a tenured employee whose position is abolished receive timely notice since non-tenured employees have a statutory

right to such notice, see, N.J.S.A. 18A:27-10, 11 and tenured employees must give 60 days notice when resigning, see N.J.S.A. 18A:28-8. The Legislature appears to have incorporated those fairness concerns in the statutory scheme for creating a State-operated school district by providing that those employees whose positions are abolished are entitled to 60 days notice or payment in lieu thereof. See N.J.S.A. 18A:7A-44.

The Commissioner agrees with the State's conclusion in this regard and adopts it as his own.

However, petitioners argue that whether or not other districts may be held to outlaying such expenses, Jersey City should not because of its unique circumstance of having such positions legislatively abolished, rather than by district-made prerogative. Such contention is without merit. The "take-over" legislation specifies which positions or provisions of the district's programs and services shall be paid for by the State, for example, in the case of the school auditors N.J.S.A. 18A:7A-41. Otherwise, be it a Type I or Type II or State-operated district, the Commissioner finds the State is not required to fund the expenses of mandated programs, services or positions, absent statutory directive to do so. See, e.g., N.J.S.A. 18A:7A-7, N.J.S.A. 18A:7A-11, N.J.S.A. 18A:7C-3, N.J.S.A. 18A:35-1 et seq., N.J.S.A. 18A:40-4, N.J.S.A. 18A:40A-10, N.J.S.A. 18A:46-6 et seq., N.J.S.A. 18A:7A-14. See State v. McGuire, supra. See also Borough of Park Ridge v. Salimone, supra.

Moreover, as noted by the State in its brief, the Legislature provided guidance where it envisioned there might arise confusion as to which entity, the district or the State, should be responsible for a particular expense, such as the salary for the State Superintendent. The statute specifies that although a state officer is appointed by the State Board, the State District Superintendent's salary is to be considered a local district expense. N.J.S.A. 18A:7A-35(c). Where not specified as an exception all expenses of a State-operated school district, including severance pay or litigation costs, remain local district expenses to be budgeted for in the usual manner, with the State contribution provided in a manner similar to that of Type I or Type II school districts. Compare N.J.S.A. 18A:7A-52A with N.J.S.A. 18A:7A-18. See also N.J.S.A. 18A:7A-50, N.J.S.A. 18A:7A-51, 52.

Accordingly, for the reasons expressed herein, the Commissioner dismisses the instant Petition of Appeal with prejudice.

COMMISSIONER OF EDUCATION

THE CITY OF JERSEY CITY ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
THE STATE-OPERATED SCHOOL DISTRICT OF THE CITY OF JERSEY CITY, HUDSON COUNTY, AND THE STATE OF NEW JERSEY,	:	DECISION
RESPONDENTS-RESPONDENTS.	:	

Decided by the Commissioner of Education, January 8, 1990

For the Petitioners-Appellants, Robert M. Schwartz, Esq.

For the Respondent-Respondent State-operated School District of the City of Jersey City, Murray, Murray & Corrigan (Karen A. Murray, Esq., of Counsel)

For the Respondent-Respondent State of New Jersey, Nancy Kaplen Miller, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

The State Board of Education affirms the decision of the Commissioner for the reasons expressed therein. In affirming that decision, we emphasize that, as observed by the Commissioner, unless specified otherwise by statute, all expenses of a State-operated school district are to be borne by the district, as is the case in Type I or Type II school districts.

June 6, 1990

Pending N.J. Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3735-89
AGENCY DKT. NO. 36-3/89

IN THE MATTER OF THE TENURE HEARING OF ROBERT VAUGHN, NEW JERSEY STATE DEPARTMENT OF CORRECTIONS

Anthony M. Palazzo, Deputy Attorney General, for petitioner (Peter N. Perretti, Jr., Attorney General of New Jersey, attorney)

Daniel J. Graziano, Jr., Esq., for respondent (Smithson & Graziano, attorneys)

Record Closed: October 16, 1989 Decided: November 21, 1989

BEFORE **NAOMI DOWER-LA BASTILLE**, ALJ:

The Department of Corrections (DOC) notified Robert Vaughn on January 4, 1989 it was considering tenure charges against him for allowing a prisoner to escape and served him with substantiating documentation. It certified tenure charges on February 15, 1989, and filed them with the Commissioner of Education (Commissioner). Respondent answered on May 15, 1989, and on May 29, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq.

A prehearing conference was held on July 14, 1989, and a hearing date of October 16, 1989, was scheduled. The matter was heard and the record closed on that date. A list of exhibits entered into evidence is appended to this decision.

DOC charged that on September 27, 1988, while Vaughn was supervising a landscaping detail, he negligently contributed to the elopement or escape of prisoner R.B., and violated administrative procedures and regulations involving safety and security, contrary to Personnel Bulletin 84-17 4 (D.7) and (D.2).

THE TESTIMONY

DOC's witnesses were Jeffrey Burns, associate administrator at Garden State Reception and Youth Correction Center (Yardville); Woodrow Brown, senior corrections officer, and Michael Farrell, internal affairs investigator. Burns has been number two in command of daily operations at Yardville for four years. Prior to that position, he held the position of assistant superintendent. Burns has been employed at Yardville for 22 years and has known respondent Vaughn for almost as long. Vaughn has been employed as a vocational teacher 2 and landscaping instructor at Yardville for 21 years. Brown was the keeper of the vocational sally port on the date R.B. escaped. Farrell related the results of his investigation.

None of the testimony was controverted because respondent called no witnesses and did not testify. Respondent's argument is that DOC cannot prove its charges because it called no eye witnesses to the prisoner's escape. The only witness was R.B.

Prisoner R.B. was not called to testify because it is DOC's policy never to call prisoners as witnesses in disciplinary cases against personnel. Instead, Farrell related information from R.B., which, although hearsay, is cognizable as corroborative of facts proved by admissible evidence. The reasons for DOC policy were not discussed, but are obvious. Escape itself is a criminal offense. N.J.S.A. 2C:29-5. The escapee would thus have a Fifth Amendment right not to testify concerning his escape. Since DOC's principal functions include securing prisoners and enforcing criminal law, it cannot opt to trade an escape conviction for discipline of an employee by immunizing a prisoner for his testimony. Secondly, tension between prisoners and corrections officers and self-serving fictions by prisoners would increase if prisoners were aware their testimony would be used in employee discipline matters. Thus R.B.'s absence from the hearing is not mysterious but results from sound policy. The same cannot be said for respondent. If he had an explanation controverting the circumstantial evidence, he would have made it. I draw an adverse inference from his failure to testify, which is permissible in civil proceedings.

Since DOC's evidence was not controverted, my findings below are based upon it.

FINDINGS OF FACT

1. Robert Vaughn, a vocational teacher 2, has been employed by DOC for 21 years as a landscaping instructor at Yardville, where he takes a detail of 6 to 14 inmates out to work in the greenhouse and on the grounds.

2. Every inmate has a custodial status on his record. There are three:

   A. Maximum custody inmates are not allowed to leave the perimeters of the institution, i.e., not allowed to go outside the doors.

   B. In and out status inmates may go outside but must remain under staff surveillance at all times.

   C. Full minimum status inmates are permitted to work on the grounds, cutting grass, farming or performing community service but may not remain unsupervised for more than 15 to 30 minutes.

3. The supervision required for reduced custody work details is embodied in an administrative policies and procedures directive, No. 311-600.1, January 24, 1986 (P-6); in a vocational control directive #46 of April 29, 1985 (P-8) and a directive to all civilian employees dated April 28, 1976 (P-11).

4. Vaughn acknowledged the 1976 directive by his signature. In May 1985, he took a refresher training course on supervising inmates in and out of the institution (P-7). His performance agreement (P-10) signed on July 30, 1987, memorializes a requirement to abide by all DOC and Department of Education (DOE) rules and to observe his prisoner detail not less than once every fifteen minutes daily and report all matters to the supervisor.

5. Among the rules to which respondent was subject were these:

Policy 311-600.1

3.2 On-grounds work details are composed of inmates who have In and Out and/or Full Minimum status.

A. These details are under the constant supervision of a staff member. In and Out inmates may never by [sic] left unsupervised or unobserved. Full minimum inmates must be visually observed at least once every thirty (30) minutes.

B. These details are never permitted to leave institutional property.

. . .

3.6 It is the responsibility of the supervisor to ascertain the custody status of each inmate on his detail and to only assign tasks appropriate to the custody status of the inmate. It is not appropriate to rely on the inmate's word in this regard.

3.7 Supervisors of men on reduced custody work details must be thoroughly familiar with institutional procedures for dealing with and reporting misconduct, escapes, and medical emergencies.

Vocational Control Directive No. 46, April 29, 1985

INMATE CUSTODY CLASSIFICATION. The following inmates will be authorized to exit/enter via vocational sallyport:

a. FULL MINIMUM . . . full minimum inmates need not have an officer or instructor escort and may perform his assigned duty by himself. Full minimum status does not entitle the inmate to leave the sallyport anytime he wants, but only when assigned by his work assignment area.

b. IN-OUT . . . are required to have an officer/instructor escort at all times when exiting/entering the sallyport.

INMATE IDENTIFICATION. You will maintain an up-to-date photograph file of all inmates authorized to exit/enter via the vocational sallyport.

April 28, 1976 Directive

TO: All Civilian Employees Assigned Outside Inmate Details

Any unusual incident must be reported immediately to the Control Center. These include fights, fires, escapes attempts, serious contraband items and refusal to perform assigned tasks. All verbal reports shall be followed by a written report to Center. Reports are to be submitted by any employee

observing the incident. . . . Reports shall be made to Center as soon as possible upon the employee's return into the institution.

. . .

In & Out Details

Inmates assigned to In & Out Details must work in a group at all times. No inmate is to leave the group at any time for any purpose unless he is escorted by an authorized employee. Inmates should be so placed that the employee will have almost constant vision of all inmates or not allow them to be out of sight more than a minute or two.

Staff members returning inmate outside work details to the institution will accompany them into the Vocational Sally port. The staff member is to remain with the detail until they have been strip searched, as prescribed by existing procedures, and the entire detail has left the Vocational Control area. The Vocational control officer and the staff member will verify with each other that the entire detail is in before the staff member leaves the area. [emphasis added]

6. The sally port consists of a double set of power controlled doors operated by an officer from his desk inside a glassed booth, which has visibility limited to the sally port area and the truck port outside.

7. Documentation for each inmate, including his photograph, custody status and approval for his movements goes to the sally port officer, who hands the documents to the vocational staff member, logs the prisoners out, and opens the outside door. Coming back in, the staff member takes his group in, stays with them until the officer verifies them; they are searched by a platform officer and approved to leave the vocational control area via the inner door.

8. At 1:08 p.m. on September 27, 1988, at the sally port Officer Woodrow Brown counted seven inmates and logged them out on a work detail with Vaughn. These included G., C., B., R.B., L., R. and D.. Of these, R.B. and two others had in and out status.

9. At 3:10 p.m., Vaughn came to the sally port door with the detail, gave the inmates' photographs to Brown through an opening in the control office, gave a thumbs up sign indicating they were all there, did not wait for the search and left. Brown counted and logged six inmates in, but since ten

other inmates from work details arrived between 2:55 and 3:12, Brown did not get to count the photos before Vaughn left.

10. Shortly thereafter, Brown counted the photographs, and, finding seven in Vaughn's group, assumed he had counted wrong and changed his log by writing a seven over the number six he had previously written.

11. At 4:15 p.m., an institutional count was taken which revealed that inmate R.B. was missing, and after a search of the institution, during which R.B. was not found, the center supervisor concluded the sallyport control officer's count was incorrect and R.B. had not returned with Vaughn.

12. A New Jersey State Police teletype was issued for the escapee (P-2). He was apprehended and returned to Yardville at 10:15 p.m.

13. The next day, Vaughn made a written report stating he had six inmates on the detail, including R.B. He did not list the name of Dassinger. He admitted that he stayed in the inmate transport van until the inmates entered the outside door, that he handed the photos to the sally port officer and then left the area.

14. DOC has a disciplinary action policy (P-15) which sets penalty guidelines for various offenses, including negligently contributing to escape (five days suspension to removal) and violation of security procedures (official reprimand to removal).

CONCLUSORY FINDINGS

15. When Vaughn took his work detail both out and back, he did not count the inmates, review their photographs and assure himself of their identities.

16. While R.B. was under Vaughn's supervision, Vaughn did not keep him under visual surveillance or assure that he did not leave the group.

CONCLUSION AND DISPOSITION

Under N.J.S.A. 18A:7B-11, teachers employed in state facilities have the same rights and privileges as those enjoyed by the Garden State School District. Thus they are protected by the tenure law, N.J.S.A. 18A:6-10, and can only be dismissed or reduced in compensation for inefficiency, incapacity, unbecoming conduct or other just cause. It is respectfully suggested to the DOC Office of Educational Services that the above statutory citations be included as a jurisdictional reference when DOC brings tenure charges against a teacher. The charges made here against Vaughn are best characterized as "other just cause" within the tenure rights statute.

The findings clearly support DOC's charges that respondent negligently contributed to the escape of a prisoner and violated security procedures. The day after the escape Vaughn stated six inmates were released to his supervision, including R.B. and named all but one in the detail of seven. If he had counted the detail and looked at the photo cards, he would have known there were seven. If he had done so coming back, he would have known one was missing. Since he did recall R.B. was in the group, he should have known R.B. was not present when they returned. It is obvious that Vaughn did not keep his eye on the inmates and prevent one from leaving the group as he was required to do for those with in and out status. Finally, had Vaughn waited until his detail was searched and checked in, as he was required to do, it would have been immediately apparent that R.B. was missing. In any event, adverse inferences attach to Vaughn's failure to give his side of the story if any exculpatory facts existed. I can only conclude there were none.

Under civil service law, Vaughn's conduct would clearly support a lengthy suspension because of its compound nature. If Vaughn knew he lost an inmate, he was obligated to report it immediately. The inmate might still have been on the grounds if Vaughn had reported him missing within 15 minutes of losing sight of him. The fact that he did not indicates that either he violated procedure by not reporting it or he never knew. If he did not know the inmate was missing, then he must not have checked his seven photos on going out or on returning the inmates. Either course of conduct was reprehensible. The safety and security of the institution, the other employees, inmates and the public outside the institution are all imperiled by such casual conduct.

Under tenure law, I can find no cases concerning teachers in correctional institutions and none accused of security violations or permitting escape. It would

not appear fair to conclude that a corrections officer could be removed for such conduct and that a civilian employee could not be merely because he is a certificated teacher. Determining the appropriateness of dismissal is difficult in light of Vaughn's 21-year tenure in his job. No prior defalcations of duty have been brought to my attention. Vaughn's conduct was essentially gross neglect of important duties. It was a serious breach of discipline. Under all the circumstances, I do not believe the conduct warrants dismissal of an employee who apparently served 21 years without adverse incident. It appears that respondent has not been suspended and thus a back pay determination is not required. My recommendation is that Vaughn have his compensation reduced by placing him one step lower on the pay scale or salary guide.

It is therefore **ORDERED** that Robert Vaughn not be dismissed from his position, but that he be placed one step lower on the pay scale or salary guide for a period of one year beginning on the date of his employment anniversary.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

OAL DKT. NO. EDU 3735-89

I hereby FILE this Initial Decision with SAUL COOPERMAN for consideration.

November 21, 1989
DATE

Naomi Dower-La Bastille
NAOMI DOWER-LA BASTILLE, ALJ

Nov. 22, 1989
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

DEC 5 1989
DATE

Mailed to Parties:
Jaynee LaVecchia/K.S.
OFFICE OF ADMINISTRATIVE LAW

ml/E

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT VAUGHN,	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF	:	DECISION
CORRECTIONS.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by both petitioner and respondent pursuant to N.J.A.C. 1:1-18.4.

In his exceptions, respondent maintains that the Department of Corrections (DOC) completely failed to prove its case against him and that ALJ LaBastille had no competent evidence whatsoever to support her findings and determinations. In particular, respondent objects to Conclusory Findings (Initial Decision, at p. 6) which he claims are unsupported even by hearsay, and to the ALJ's having drawn adverse inferences from respondent's refusal to testify. In the first instance, he argues that the ALJ gave no recitiation of testimony, instead offering as Findings of Fact (I.D., at pp. 3-6) her own contention as to what the testimony before her was; moreover, even in these findings (excepting No. 9) there is nothing to justify drawing conclusions of any type regarding what respondent did, or did not, do in the handling, supervision and counting of inmates. In the second, he argues that there was no need for him to appear, since there was no direct evidence requiring rebuttal on his part and the burden of proof was entirely on the DOC.

The DOC, on the other hand, takes issue with the ALJ's determination that dismissal for a first offense, however serious, is too harsh a penalty for an otherwise unblemished employee. In support of its position, the DOC quotes passages from the initial decision characterizing respondent's conduct as "gross neglect of important duties," "a serious breach of discipline," "reprehensible" and imperiling the "safety and security of the institution, the other employees, inmates and public outside the institution***." (I.D., at pp. 7-8)

Upon a careful review of this matter, the Commissioner determines to affirm the initial decision of the ALJ with modification, for the reasons stated below:

It is true that there appear to have been no direct witnesses to R.B.'s escape and, hence, no direct evidence as to precisely what conduct on respondent's part made the escape possible. However, it is undisputed that R.B. left the institution in respondent's custody but did not return with him; that adherence to specific procedures, with which respondent was fully acquainted, was required to ensure awareness and control of inmates on work

details, and that had these been followed, unnoticed escape would have been virtually impossible; and that respondent failed to comply with at least one such procedure (waiting during search and log-in), which at the very least contributed to a delay in the institution's realization that R.B. had escaped. Under these circumstances, the Commissioner must concur with the ALJ's underlying reasoning that, lack of eyewitnesses notwithstanding, the end result of this matter -- the undetected escape of an inmate required to have been under constant supervision -- would not have been possible without serious neglect and/or procedural failure on respondent's part. In so demonstrating, the DOC has met its burden of proof.*

With respect to the penalty to be imposed, the ALJ points to an absence of precedent for teachers in correctional facilities and, thus, lacking guidance, makes her own assessment that a career of 21 years should not be terminated on one offense, albeit serious. The Commissioner concurs with this determination, but holds the penalty imposed by the ALJ to be insufficient in view of the serious import of respondent's conduct given the nature of his job.

Respondent does not work for a public school district; he works for a correctional facility where custody and supervision of students take on a dimension which is simply not present in the routine school setting. To be negligent, careless or casual in this environment compromises the very purpose of incarceration and is regarded within the correctional community as a breach of the most serious order, as indicated by the relative severity of penalties (Exhibit P-13) attached to violations in the area of security by Department of Corrections personnel. In this case, respondent's conduct resulted in the undetected escape of an inmate judged sufficiently risky to be classified as "in and out" rather than "full minimum," as were all but one other of his six co-workers. That no harm came to R.B., staff, inmates or the public as a result of his escape was fortunate, but does not lessen the potential mischief that respondent's behavior might have unleashed. Thus, the Commissioner cannot concur with the ALJ that a relatively modest reduction in salary is all that is warranted in this instance.

Accordingly, the initial decision of the Office of Administrative Law is modified to the extent that Robert Vaughn

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* The Commissioner finds respondent's objection to the ALJ's failure to recite testimony independent of her Findings of Fact to be without merit, given that all testimony was uncontroverted, the ALJ offered a reasonable explanation for her procedure, and respondent failed to provide the Commissioner with a transcript, or any examples therefrom, to demonstrate the inaccuracy of the ALJ's summation.

shall be placed one step lower on the salary guide, shall forfeit six months' salary, and shall remain at the level on the salary guide to which he has been reduced for one year following his next anniversary date.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT VAUGHN, NEW	:	STATE BOARD OF EDUCATION
JERSEY STATE DEPARTMENT OF	:	DECISION
CORRECTIONS.	:	
	:	

Decided by the Commissioner of Education, January 9, 1990

For the Petitioner-Respondent, Anthony M. Paulazzo, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

For the Respondent-Appellant, Smithson & Graziano (Daniel J. Graziano, Jr., Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

July 5, 1990

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 2125-89
AGENCY DKT. NO. 40-3/89

ARTHUR PAGE,
Petitioner,
v.
BOARD OF EDUCATION OF CITY OF TRENTON, MERCER COUNTY,
Respondent.

Robert M. Schwartz, Esq., for petitioner
Thomas W. Sumners, Esq., for respondent (Blackburn & Dixon, attorneys)

Record Closed: November 13, 1989 Decided: November 27, 1989

BEFORE **NAOMI DOWER-LABASTILLE,** ALJ:

On March 7, 1989 Arthur Page filed a petition alleging that the Board of Education of Trenton (Board) took retaliatory disciplinary action against him, members of his family and members of his department, including the filing of an unjustified reprimand on December 14, 1988. On March 23, the Commissioner of Education transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 et seq.

A prehearing was held on May 31, 1989. The prehearing order directed that motions to dismiss on any grounds be filed by June 19 and answered by July 3, 1989. Board counsel was granted adjournment of the August 9 and 10, 1989 hearing dates on grounds his principal witness was on vacation. He also advised that the Board's superintendent had agreed to remove the letter of reprimand from petitioner's file and settlement discussions were on going. A hearing was held on September 27, 1989 during which the respondent made a summary decision motion which was granted by my oral decision on the record. The parties expressed an intention to

order the transcript of the decision. By October 17, 1989, no transcript had been ordered. I therefore caused a transcript to be ordered for attachment to this initial decision. The record closed on November 13, 1989 upon receipt of the transcript.

SUMMARY OF DECISION ON MOTION

The Board moved to dismiss allegations of filing of a unjust reprimand against petitioner on grounds that the issue was moot because the reprimand was removed in accordance with petitioner's demand. I concurred with the Board's position.

The Board then moved to dismiss petitioner's allegation that an evaluation made on October 28, 1988 and acknowledged on November 17, 1988 contained unjustified criticism on grounds that the complaint was untimely because the petition was filed on March 9, 1989. The dates were not disputed. I concurred with the Board that the complaint as to the evaluation was untimely under *N.J.A.C.* 6:24-1.2. Petitioner argued that the issue involved ongoing or continued action leading to the reprimand of December 14, 1988 and that the 90-day rule should be relaxed in accordance with *N.J.A.C.* 6:24-1.2. I found no justification for waiver of the rule particularly in light of the withdrawal of the subsequent reprimand. Thus all allegations leading to the reprimand were moot and the evaluation allegations were barred as untimely. A copy of the evaluation was placed in the record as R-1.

The first two motions concerned cognizable remedies of removing a reprimand from petitioner's file, and removing a short portion of his evaluation which was critical. (Most of the evaluation recognized petitioner's work as outstanding.) The only other cognizable remedy requested was a cease and desist order directing the Board to comply with a State Corrective Action Plan (CAP) order. Petitioner alleged that the Board had improperly interfered in the administration of personnel matters. The Board argued that jurisdiction to investigate and enforce the CAP order lay in the County Superintendent, at least initially and that petitioner has no standing to bring a complaint based on the CAP order.

For the purposes of the motion, I assumed that the only fact alleged was true. That allegation was that a Board member ordered the superintendent of schools to place a reprimand in petitioner's file. I then interpreted the Commissioner's order dated May 18, 1987 in *Page, Pearson and Zdanowica v. Board of Education of Trenton*, EDU 6626-85 and EDU 418-86, wherein he directed the County Superintendent, after an investigation, to report to the Commissioner if the Board or

its members are not in compliance with the CAP order. Based on the cited order, I **CONCLUDE** that petitioner had no standing to initiate an enforcement action concerning the CAP but rather, that the procedure set down by the Commissioner must be followed. I also noted that even if a board member had directed the Superintendent to bring a disciplinary action, such action was not addressed by the CAP order directives concerning appointments, transfers and promotions of personnel.

My rulings and rationale on the record constitutes the initial decision in this matter. The transcript containing them is attached hereto.

It is therefore **ORDERED** that the petition be **DISMISSED** for the reasons stated in the transcript of September 27, 1989.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

November 27, 1989
DATE

NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

Nov. 28, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

DEC 1 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

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ARTHUR PAGE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF TRENTON, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner pursuant to N.J.A.C. 1:1-18.4. Respondent's request for an extension of time within which to file its reply was not received within the period allotted by N.J.A.C. 1:1-18.8(b), and, although forthright reasons were given for the delay, they did not rise to the level of emergency or other unforseeable circumstance within the meaning of the regulation as it pertains to waivers. Accordingly, the Commissioner has not permitted late filing of reply exceptions in this instance.

In his exceptions, petitioner argues that the Administrative Law Judge (ALJ) erred in dismissing the major portion of his appeal for lack of standing, inasmuch as she assumed that he was seeking general enforcement of the Corrective Action Plan (CAP), when in fact he was seeking protection of his own personal rights. His complaint before the Commissioner, he argues, was to seek redress for the Board's systematic retaliation and discrimination against him and staff members associated with him, not to see that the CAP was adhered to as a matter of public interest. Investigation of the latter, he concedes, may be within the power of the County Superintendent of Schools. What he seeks, however, is an order to the Board to cease and desist from interfering with his rights of employment, a claim that is cognizable solely before the Commissioner under N.J.S.A. 18A:6-9.

Petitioner also objects to the ALJ's dismissal of that portion of his appeal dealing with a December 14, 1988 letter of reprimand on grounds of mootness, arguing that the central issue is as much the Board's inappropriate coercion of this letter from the superintendent as the letter itself, and that mere removal of the letter from his personnel file does not alter his concerns about Board interference in district administration, particularly supervision and discipline of personnel.

Petitioner finally takes exception to the ALJ's determination that the remaining cognizable portion of his complaint was untimely, in that his appeal dealt with a series of actions, the last of which did not occur until on or about December 14, 1988; thus, his petition of March 9, 1989 was timely filed for the entire sequence of events. For all of the foregoing reasons, petitioner asks that the ALJ's order of dismissal be reversed and the matter remanded for a full hearing on the merits.

Upon a careful review of this matter, the Commissioner affirms the basic holdings of the ALJ together with the additional directives incorporated herein.

The Commissioner concurs that the instant petition of appeal essentially reduces to three matters: the disputed evaluation of Fall 1988, the reprimand of December 1988, and habitual violation of the CAP as it relates to Board involvement in district personnel operations. As the ALJ recognizes, the first two of these are distinct causes of action, for which distinct remedies are sought, over and above their role as part of an alleged pattern of harassment. The third, on the other hand, is a more amorphous charge with implications far beyond violation of the individual rights of petitioner, for which the remedy sought is a general "cease and desist" order from the Commissioner.*

With regard to any specific remedy arising from the first two causes of action, the Commissioner concurs with the ALJ, for the reasons stated in her decision, that appeal of the disputed evaluation was untimely filed and the matter of the reprimand has been rendered moot. Regardless of whether or not petitioner believed that the disputed evaluation was part of a pattern of harassment, he was obliged to seek the specific remedy of removing its offending passages within the time frame allotted for bringing controversies before the Commissioner. This is particularly true in view of the alleged ongoing nature of the Board's actions. There is no reason why, for example, it was necessary, or even justifiable, for petitioner to delay filing until the Board took a second appealable action (the reprimand of December 14), unrelated to the first so far as the record shows, except as evidence of the third distinct charge of continual violation of the CAP through retaliation and harassment. With respect to the remedy sought for the reprimand itself, as the ALJ notes, there is no further relief the Commissioner can offer given that the contested document has already been expunged from petitioner's record.

However, as noted above, these matters stand both as causes of action in and of themselves and as examples of inappropriate conduct underlying the broader charges related to Board implementation of the CAP; as petitioner notes in his exceptions regarding the December 14th reprimand, the issue is as much the Board's coercion of the superintendent's action as the action itself. The Commissioner is concerned over these allegations, but concurs with the ALJ that establishing violations of the CAP must be done by and through the County Superintendent of Schools, who has been charged both in the CAP itself and in subsequent orders with monitoring, and investigating, if need be, Board actions in the area

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* The Commissioner notes that an alleged violation of the Open Public Meetings Act (Petition of Appeal, at p. 4, Transcript of Hearing, at p. 16) might also have been considered a separate cause of action, but was not, because the action to be voided was the December 14th reprimand subsequently removed from petitioner's file.

of personnel. In a prior matter involving the same petitioner, the Commissioner held that:

> ***the total record in this matter raises serious concerns that the Trenton Board of Education may be slipping back into the very same type of inappropriate behaviors and actions which served to trigger the original order to show cause, the oversight of the Monitor General and the CAP in that district. The record unequivocally gives indication that some board members, particularly Board President Medina and Mr. Dileo, are inappropriately interfering with the administration of the district.
>
> Consequently, the Commissioner orders that the county superintendent become more directly involved with and pay greater attention to all appointments, promotions and transfers occurring in the district. This shall be accomplished through the submission of a monthly letter of assurance from the superintendent that all personnel actions taken during that month are in compliance with the directives of the CAP. Moreover, the Commissioner reserves to the county superintendent the right to question and to acquire as much information as she deems necessary on any and all personnel actions of the Board.
>
> Should the county superintendent ascertain/determine that the Board's actions, or any member's thereof, in this regard are not in strict conformance with the CAP, she shall immediately report same to the Commissioner for appropriate action. The members of the Trenton Board are cautioned that the provisions of the CAP can and will be invoked in their entirety if the county superintendent and the department of education find that this step is warranted to prevent regression or reversion to the very improprieties which prompted the CAP in the first place.*** (Page et al., supra, at pp. 40-41)*

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* The Commissioner notes his disagreement with the ALJ's dictum to the effect that the CAP order does not pertain to disciplinary actions, but only to appointments, transfers and promotions of personnel (I.D. at 3, Transcript at 40-41, referring to the quoted passage and to In re Trenton Bd. of Ed., 1979 S.L.D. 696-97). A broader reading of the seminal passages, taken in context, clearly indicates that the purview of the CAP was intended to extend to all areas of Board interference in personnel matters.

Thus, even if one is pursuing a complaint to protect his own personal rights rather than the general good, as petitioner states that he is, the initial duty to investigate, establish facts and recommend appropriate action to the Commissioner falls to the County Superintendent with direct oversight and "hands on" experience in the matter rather than to an administrative hearing officer. In this case, even if the Board's alleged harassment and interference were shown to be limited to petitioner, a violation would exist as surely as if the practice were more widespread, and the remedy would still be the same: a "cease and desist" directive at the very least, and quite possibly imposition of additional procedures and penalties as well.*

Accordingly, the Commissioner affirms the decision of the ALJ dismissing the instant Petition of Appeal. However, he also directs the Mercer County Superintendent of Schools to investigate petitioner's allegations relative to possible violations of the CAP and report any violations to the Commissioner for appropriate actions. He further directs that dismissal of petitioner's appeal regarding his Fall 1988 evaluation and the December 1988 letter of reprimand, as distinct causes of action before the Commissioner, shall not preclude those matters from being considered by the County Superintendent in her investigation.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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* The Commissioner here notes petitioner's contention (Transcript, at pp. 29-31) that the record in this matter is silent as to whether or not petitioner first exhausted his remedies at the county level, so that the ALJ should not presume that he did not. However, the Petition of Appeal (at pp. 2-3) clearly implies that petitioner was kept from such action by the Board, which then sought to retaliate against him "in the belief" that he had ignored its warning. If petitioner did take such action, the end result of his efforts and the decision herein would be the same, so that he has not been prejudiced by the ALJ's reasonable presumption.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4379-89
AGENCY DKT. NO. 142-5/89

BOARD OF EDUCATION
OF THE BOROUGH OF
MANVILLE,
Petitioner,
v.
MAYOR AND COUNCIL OF
THE BOROUGH OF MANVILLE,
Respondent.

Raymond R. Trombadore, Esq., for the petitioner (Raymond R. and Ann W. Thompson, attorney)

John F. Richardson, Esq., for the respondent

Record Closed: October 16, 1989 Decided: November 29, 1989

BEFORE **BEATRICE S. TYLUTKI**, ALJ:

On April 4, 1989, the electorate of the Borough of Manville rejected the proposed school budget for the 1989-90 school year that was prepared by the petitioner, the Board of Education of the Borough of Manville. On April 27, 1989, the Mayor and Council of the Borough of Manville, the respondent, adopted a resolution which reduced the appropriation for current expenses by $490,955.00. The current expense portion of the budget was reduced from $5,933,536.00 to $5,442,581.00. The petitioner contends that this reduction was arbitrary, unreasonable and capricious and that the deleted funds are necessary to provide a thorough and efficient system of public education in the school district.

The petitioner filed an appeal with the Commissioner of Education (Commissioner) on May 17, 1989. After receiving an answer to the petition from the respondent, the Commissioner transmitted this matter to the Office of Administrative Law on June 14, 1989, for determination as a contested case, pursuant to N.J.S.A. 52:14F-1 et seq and N.J.S.A. 52:14B-1 et seq..

The prehearing conference was held on July 21, 1989, at which time it was decided that the hearing would be held on October 16 and 20, 1989, at the Somerville Municipal Court. The hearing took place on October 16, 1989, and the record closed on that date.

The only issue in this matter is whether the monies deleted from the 1989-90 school budget by the respondent are necessary in order to provide a thorough and efficient system of public education in the school district as required by N.J.S.A. 18A:22-37.

FACTUAL FINDINGS

I **FIND** the facts in this matter are not in dispute.

The following is a review of the specific line item reductions proposed by the respondent. Included under each item is the respondent's reason for the reduction as well as the petitioner's response thereto.

Account No. 120.B-Legal Fees. The respondent proposed a reduction of $7,000.00 based on a historic review of the actual expenditures for the previous three school years, each of which was less than $9,000.00. It is the respondent's position that the remaining amount of $10,500.00 is sufficient to provide legal services for the school district. The petitioner disagreed and stated that it anticipates additional legal fees during the 1989-90 school year, which include the legal fees for this matter and that the full amount of $17,500.00 is reasonable and should be restored.

Account No. 120.D-Contracted Services. The respondent recommended a reduction of $10,000.00 based on the actual expenditures during the 1986-87 and 1987-88 school years, each of which was less than $21,000.00. The petitioner disagreed with this reduction and stated that the full amount of $33,500:00 is necessary and has been encumbered and should be restored. According to the

petitioner, this item is used to pay for the labor relations consultant, the asbestos management plan and monitoring, other contracted consultant services, and school supplies. Additionally, the petitioner noted that Peter P. Sepelya, the respondent's consultant, did not mention the amount expended from this line item during the last school year, 1988-89, in his historic review of the actual monies used for these purposes.

Account No. 211-Salaries of Principals. The respondent reduced this line item by $14,455.00, and stated that based on the previous year's salaries and assuming a salary increase of 9.3 percent, the petitioner would have an adequate amount in the account after the reduction. The petitioner stated that the contract negotiations for the principals' salaries are still ongoing; however, it has budgeted a 9.5 percent increase for the principals, the same percent as provided to teachers. Additionally, the petitioner stated that it has hired a new principal for the Westen School at a salary which is 11.1 percent higher than last year's salary for that postion and that this account is also used for employee awards which are given annually. The Board stated that the full amount orginially budgeted is necessary and should be restored.

Account No. 213.1-Salaries of Teachers. The respondent reduced this account by $276,600.00, and stated that based on the salaries paid to teachers in the 1988-89 school year plus a 9.3 percent increase in salaries as well as anticipated teacher retirements and other vacancies, the petitioner would have an adequate amount in this account after the reduction. The petitioner disagreed and stated that there has been an increase in enrollment at the elementary grade levels and in order to have a comprehensive education program it needed to hire two additional teachers. Further, the petitioner stated that the increment is 9.5 percent rather than 9.3 percent. I accept the petitioner's representation as to the amount of the increment. The petitioner stated that the full amount has to be restored in order to pay the teachers' salaries as well as to provide payment for certain staff development programs, for extra work by teachers, summer school and substitute teachers, which are included in this item.

Account No. 214.A-Librarians. The respondent reduced this item by $10,000.00 on the basis that library aides should not be used to monitor daily playground activities. The petitioner stated that two library aides are necessary to monitor playground activities at the Westen School (400 children) while the teachers are on a lunch break. The petitioner admitted that the cost could be placed elsewhere in the budget but that the help was necessary in order to meet the petitioner's

responsibility for the safety and security of the children, and requested that the full amount be restored.

Account No. 214.C-Child Study Personnel. The respondent reduced this account by $10,000.00 and stated that the remaining amount would be adequate based on actual expenditures in prior school years. The petitioner disagreed and stated that there are more than 200 children with handicaps in the Manville School District and that the full amount is necessary in order to properly staff the child study teams and to prepare for state monitoring in February 1990. The reduction proposed by the respondent would result in the loss of a part-time social worker.

Account No. 214.D-Audio Visual Personnel. The respondent reduced this item by $300.00 on the basis that this is a part-time position and does not warrant a salary increase. The petitioner disagreed and requested that the full amount be restored since it wants to increase this salary by the 9.5 percent increase it has agreed to give to the teachers.

Account No. 610-Salaries of Custodians. The respondent reduced this account by $5,000.00 and stated that the remaining amount in the account was adequate based on the 1988-89 expenditures and a salary increase of 9.5 percent. The petitioner disagreed and stated that the deleted money is necessary to pay for the anticipated overtime payments which will be necessary because of certain school projects as well as the school monitoring program.

Account No. 640.B-Electric and Gas. The respondent reduced this account by $25,000.00 based on the amount budgeted for electric and gas during the 1988-89 school year and the fact that there has been no proposed increase in the rates for electric and gas. The petitioner stated that the original amount in the account represented its best estimate of its needs during the 1989-90 school year and that the school district paid $3,000.00 more than the amount budgeted for electric and gas during the 1988-89 school year. The petitioner requested that the full amount should be restored since electric and gas prices can increase during the school year and the gas bills may increase since two new gas fired boilers have been installed to replace an old oil fired boiler and a gas fired boiler.

Account No. 710.B-Salary for Maintenance. The respondent reduced this account by $46,600.00 on the basis that the use of part-time help and contractors can achieve savings in this area and that the remaining balance in the 1988-89 school

budget can be used for this purpose. The petitioner disagreed and stated that the full amount should be restored since two additional maintenance workers are necessary in order to properly maintain the four buildings now used by the school district.

Account No. 720.B-Repair of Buildings. The respondent reduced this account by $40,000.00 on the basis of the historic review of expenditures from this account and suggested that the petitioner try to get State or federal money to help pay for the expense. The petitioner stated that the full amount budgeted for this account is necessary in order to properly maintain the school buildings and that monies from this account will be used for roof repairs, asbestos abatement, repairs of the parking lots and other repairs.

Account No. 720.C- Repair of Equipment. The respondent reduced this account by $3,000.00 based on the amounts used in previous years to repair equipment. The petitioner stated that the full amount budgeted for the item is necessary in order to maintain the equipment and it emphasized the various sophisticated electrical equipment now used in the schools.

Account No. 730.2-Purchase of Equipment (Non-Instructional). The respondent reduced this account by $3,000.00 based on the amount used from this account in the 1988-89 school year. The petitioner stated that the full budgeted amount is necessary since it has delayed the purchase of certain items which are now badly needed.

The total amount of the proposed reductions to the above accounts is $450,955.00. In addition, the respondent has proposed that $40,000.00 be withdrawn from surplus and applied to further reduce the amount needed to be raised by the tax levy. At the time the respondent made this recommendation there was approximately $395,000.00 in surplus. Since then, the Board has used or plans to use a substantial amount of the surplus. In the beginning of the school year, the petitioner found that the fire alarm and emergency lighting system did not work and it has or will use approximately $25,000.00 from surplus to repair this system. Approximately $100,000.00 of the surplus was used to install a boiler. Initially, the petitioner anticipated that one boiler would have to be replaced and the money for this boiler was provided for by a bond issue. However, when the contractor started working on the project in April 1989, he found that both 33 year old boilers had to be replaced and that it made no sense to replace only one boiler. The petitioner

agreed and used surplus money to replace the second boiler. Additionally, the petitioner stated that $50,000.00 of the surplus will have to be used for tuition costs for special education programs since the amount of money budgeted for this purpose is inadequate. In view of the monies that have or will be taken from the surplus, the petitioner represented that it would be inappropriate to further reduce this account by $40,000.00 as suggested by the respondent.

CONCLUSIONS OF LAW AND RECOMMENDATIONS

The appropriate section of N.J.S.A. 18A:22-37 provides that:

> The governing body of the municipality, or of each of the municipalities, included in the district shall, after consultation which the Board, and by April 28, determine the amount which, in the judgment of said body or bodies, is necessary to be appropriated, for each item appearing in such budget, to provide a thorough and efficient system of schools in the district.

In discussing the requirements of this statutory provision, the State Supreme Court stated:

> the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated "thorough and efficient" East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education has fixed or what he would fix if he were acting as the original budget-making body under R.S. 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness. [East Brunswick Twp. Board of Education v. East Brunswick Township Council, 48 N.J. 94, 107 (1966)]

The Supreme Court also recognized that the governing bodies have the obligation to conduct an independent analysis of the school budget if it is rejected by the electorate, and stated:

> The governing body may, of course, seek to effect savings which will not impair the educational process. But its determinations must be independent ones properly related to educational considerations rather than voter reactions. In every step, it must act conscientiously, reasonably and with full regard for the State's

> educational standards and its own obligation to fix a sum sufficient to provide a system of local schools which may fairly be considered thorough and efficient in view of the makeup of the community. [East Brunswick at 105-06].

Raymond R. Trombadore, Esq., on behalf of the petitioner, argued that the proposed budget reductions as well as the proposed use of some of the surplus was based on the respondent's reaction to the defeat of the school budget and was not based on a full analysis of the impact of the reductions on the operation of the school system. Mr. Trombadore argued that the school budget as prepared by the petitioner, contains the minimum amounts required for the thorough and efficient operation of the school system and that all of the reductions should be restored. Additionally, Mr. Trombadore argued that the $40,000.00 should be returned to surplus, since a school district needs a surplus of approximately three percent of its current expense budget. Bd. of Ed. of Delaware Valley Reg. H.S. v. Twp. Committee of Alexandrea et al., OAL DKT. NO. 4921-88 (Dec. 7, 1988), adopted by Commission, Feb. 6, 1989; Perth Amboy Bd. of Ed. v. Perth Amboy City Council, OAL DKT. NO. 3856-87 (Oct. 20, 1987), adopted by Commissioner, Dec. 2, 1987. Mr. Trombadore argued that I should take into consideration that a substantial portion of the surplus has already been used or will be used for legitimate purposes and that the transfer of the $40,000.00 from surplus to help defray current expenses is unreasonable .

John F. Richardson, Esq., on behalf of the respondent, stated that the school budget proposed by the petitioner represents an 17 percent increase over the last budget and that the municipality cannot afford such a substantial increase. In addition, Mr. Richardson argued that the reductions proposed by the respondent are reasonable and will not adversely affect the ability of the school district to provide for a thorough and efficient system of education. Even with the reductions proposed by the respondent, Mr. Richardson stated that there will be a substantial increase in the school budget.

Additionally, Mr. Richardson argued that the respondent's proposal should be evaluated based on the information available to the respondent at the time of the adoption of the resolution making the reductions. Otherwise, he argued that any board could put itself into a more favorable position by spending surplus money prior to an administrative hearing regarding its budget appeal.

After reviewing the arguments of the parties as well as the testimony and exhibits introduced into evidence, I **CONCLUDE** that the petitioner's arguments are persuasive and the full amounts be restored to the following line items:

Account No. 120B - Legal Fees - $7,000.00
Account No. 120D - Contract Services - $10,000.00
Account No. 211 - Salaries of Principals - $14,455.00
Account No. 213.1 - Salaries of Teachers - $276,600.00
Account No. 214C - Child Study Personnel - $10,000.00
Account No. 214D - Audio Visual Personnel - $300.00
Account No. 610 - Salaries of Custodians - $5,000.00
Account No. 710.B - Salaries for Maintenance - $46,600.00
Account No. 720.C - Repairs of Equipment - $3,000.00
Account No. 730.2 - Purchase of Equipment - $3,000.00

As for Account No. 214.A-Librarians, I **CONCLUDE** that there is a question as to whether library aides or some other type of aides should have the responsibility for monitoring children in the playground at lunch time. However, I am convinced that there is a need for such aides and the respondent has not shown that the petitioner has other staff members to provide this service while the teachers are on a lunch break, and therefore, I **CONCLUDE** that the entire amount of $10,000.00 be restored.

As to Account No. 640.B Electric and Gas, I **CONCLUDE** that the petitioner's arguments for the restoration of the reduction were not persuasive and I accept the respondent's argument that even with the deduction of $25,000.00 there is sufficient money in this account to meet the electric and gas needs of the school district. Therefore, I **CONCLUDE** that no monies be restored to this account.

As to Account No. 720.B-Repairs of Buildings, I **CONCLUDE** that the petitioner's argument for the restoration of the reduction was not persuasive and I accept the respondent's argument that some of the repairs have a low priority and can be delayed,for example, the repair and resurfacing of the parking lots. Therefore, I **CONCLUDE** that no monies be restored to this account.

Based on the above, I **CONCLUDE** that a total of $385,955.00 be restored to the current expense portion of the school budget for the 1989-90 school year.

As to the restoration of the $40,000.00 to surplus, I **CONCLUDE** that the respondent's argument is persuasive and that $40,000.00 should be used from surplus to defray the current expenses in the 1989-90 school budget.

It has been recognized that a governing body may consider the surplus as part of its review of the school budget, Branchburg Board of Education v. Branchburg Township Committee, 187 N.J. Super. 540 (App. Div. 1983). Also, I recognize that there is no established formula as to what constitutes an appropriate surplus. A standard of three percent has been suggested by case law; however, the amount of the appropriate surplus can be less or more depending on the circumstances. At the time of the adoption of the respondent's resolution, the use of the $40,000.00 from surplus would not have reduced the surplus below three percent of the current expense budget, and I agree with the respondent's argument that the evaluation of its action must be made based on the circumstances that existed at the time it adopted the resolution. Although the actual or proposed expenditures of surplus by the petitioner along with the $40,000.00 reduction proposed by the respondent will mean that there will be less than three percent in surplus, I **CONCLUDE** that there is an adequate amount for the 1989-90 school year.

Therefore, I **ORDER** that the respondent certify the additional amount of $385,955.00 to the Somerset County Board of Taxation for school purposes for the 1989-90 school year, to be included in the taxes to be assessed, levied and collected in the municipality.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

November 29, 1989
DATE

Beatrice S. Tylutki
BEATRICE S. TYLUTKI, ALJ

Receipt Acknowledged:

11/30/89
DATE

Seymour Cooperman
DEPARTMENT OF EDUCATION

Mailed to Parties:

Dec. 4, 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

caj

BOARD OF EDUCATION OF THE BOROUGH OF MANVILLE, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE BOROUGH OF MANVILLE, SOMERSET COUNTY, RESPONDENT.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record, the Commissioner agrees with the findings and conclusions of the Administrative Law Judge and adopts the initial decision as his final decision in this matter.

Consequently, the local tax levy for the 1989-90 school year current expense budget is established as follows:

AMOUNT CERTIFIED	AMOUNT RESTORED	TOTAL
$5,442,581	$385,955	$5,828,536

Accordingly, the Somerset County Board of Taxation is directed to make the necessary adjustment set forth above to reflect a total amount of $5,828,536 to be raised in tax levy for the Borough of Manville School District's 1989-90 current expense budget.

COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ATHLETIC	:	
ELIGIBILITY OF C.G., SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION
PISCATAWAY, MIDDLESEX COUNTY.	:	
	:	

For the Petitioner, Rubin, Rubin, Malgran & Kuhn
(David B. Rubin, Esq., of Counsel)

For the Respondent, Hannoch Weisman (Michael J. Herbert, Esq., of Counsel)

This matter was opened by way of petition to the Commissioner pursuant to N.J.S.A. 18A:11-3 authorizing the Commissioner to hear and decide appeals from decisions of the New Jersey State Interscholastic Athletic Association (NJSIAA).

C.G. is a 19-year-old youth classified as perceptually impaired since eighth grade whose request for a waiver of Article V, Section 4C of the NJSIAA Bylaws was denied by the Eligibility Appeals Committee of the NJSIAA. The aforesaid article provides that "an athlete becomes ineligible for high school athletics if he/she attains the age of 19 prior to September 1.***" (NJSIAA Handbook, at p. 38) Since C.G. became 19 on June 18, 1989, he became ineligible by virtue of his age to participate in the Piscataway High School basketball program, absent a waiver of the aforementioned rule and despite his having participated in athletics for only the three high school years in which he was enrolled.

A request for an eligibility ruling made by James R. Koch, principal of Piscataway High School, resulted in a decision ruling C.G. ineligible as did subsequent appeals to the Eligibility Appeals Committee on October 11, 1989 and December 6, 1989. The aforesaid appeals to the Eligibility Appeals Committee were based upon the "NJSIAA Interpretive Guidelines for Student-Athlete Eligibility," Section 3a, at p. 59 which provides that "***waivers*** will be granted by the NJSIAA in only truly extraordinary circumstances." The aforesaid guidelines likewise provide as follows:

> It is recognized that as a result of their Individual Education Program (IEP), many handicapped students will be required to extend

> their elementary and secondary education beyond the customary twelve years. Since the NJSIAA supports the fullest participation of the handicapped students, consistent with their IEPs and appropriate physical examinations, member schools should encourage such students to compete in interscholastic sports for their four years of eligibility, even when they are attending special education classes or satellite schools. In this way the age requirement will have a minimum impact upon handicapped students, who would be otherwise eligible to participate for the normal four years of eligibility. If as a result of circumstances beyond his/her control, such a student cannot be eligible for four years because of the age rule, that rule may be waived in non-contact sports where physical contact is not a factor (bowling, cross-country, fencing, golf, gymnastics, skiing, swimming and diving, tennis, track and volleyball). However, a waiver will not be granted whatever the circumstances, so as to permit any student to be eligible if he/she has reached the age of 20 before the start of a particular sports season. (Handbook, at p. 59)

By way of further background, C.G. began his schooling in Brooklyn, New York where he was retained in both second and fourth grades. Sometime thereafter, C.G. moved to Piscataway where he was classified as perceptually impaired in the eighth grade. Upon enrollment at Piscataway High, C.G. played freshman basketball in grade 9, J.V. basketball in grade 10 and varsity in grade 11 where he was a sometime member of the starting team.

Arguments of Petitioner

Petitioner argues that he is entitled to a waiver under existing rules since he meets the burden of demonstrating the exceptional circumstances required under the so-called age rule. Insofar as petitioner is classified as perceptually impaired since grade 8 and testimony elicited from the Piscataway school psychologist, Gerald Halper, contends that C.G.'s repeating grades 2 and 4 was directly related to that perceptual impairment, his continued attendance in high school at age 19 is as a result of circumstances beyond his control as permitted by the "Interpretive Guidelines."

Petitioner further argues that participation in the basketball program has had a positive influence in that he has developed self esteem through the recognition afforded him as a member of the team. Petitioner cites the testimony of the high school principal as evidence of such success (10/11/89 transcript 70:7-15).

Petitioner cites the latest IEP developed in September 1989 as support for the proposition that continued participation in the basketball program is a support service conducive to his continued development. See Petitioner's Brief Exhibit C.

Petitioner contends that the decision to deny him a waiver is arbitrary, capricious and unreasonable. He notes that the denial was based in part on a conclusion that petitioner's failures in second and fourth grades were unrelated to his perceptual impairment ignoring testimony to the contrary from the school psychologist. (See 12/6/89 Transcript 106:6-8, 103:11-24, 104: 10-17.)

Petitioner further contends that the decision of NJSIAA is based upon the misconception that perceptual impairment is the least severe of all learning disabilities. He takes exception to such a conclusion arguing that there are no degrees of importance among handicapping classifications and that perceptual impairment is a significant disability which affected his educational progress and caused him to prolong his education for reasons beyond his control. In fact, argues C.G., denial of the right to participate in basketball will inhibit the Piscataway Board of Education from its responsibility to provide a service deemed significant to effective implementation of his IEP.

Finally, petitioner argues that the granting of a waiver in this case will not interfere with the age rule since safety is not a factor in that C.G. is only 5 foot 9 inches tall and weighs 148 pounds nor, contends petitioner, does it promote particular athletic advantage to Piscataway High School since C.G., although a likely starter, is not the caliber of player who would significantly enhance the prospects of the team. As proof of the lack of competitive edge to be gained by Piscataway, petitioner cites the fact that the other coaches in Piscataway's conference have signed forms attesting to their consent to the waiver.

Thus, contends petitioner, failure to grant the waiver is arbitrary and should be set aside.

Respondent's Arguments

In response to the aforesaid arguments respondent (NJSIAA) relies upon the reasons presented to petitioner in its written decision following the October 11, 1989 hearing into this matter as set forth below:

> 1. The repetition of the second and fourth grades by the student was several years before he was classified as "perceptually impaired".
>
> 2. Although a "psychological re-evaluation", dated May 26, 1989, was presented to the EAC, that document did not provide any objective testing or a medical basis for establishing that the "perceptual impairment" would have prevented this student from a normal academic progression with his chronological peers.
>
> 3. The EAC takes note that over 20% of all secondary students in New Jersey have been classified in various categories of learning disabilities. The term "perceptually impaired" is the least severe of all such classifications.

> The EAC makes this observation because of comparisons made by the Appellants with earlier cases in which age waivers were granted to handicapped students.*** In those limited instances, the handicap was with a total loss of hearing or actual mental retardation. The material presented demonstrates that this student is in the average I.Q. category and has no physical impairments whatsoever, other than the classification of "perceptual impairment". To grant waivers to 19 year old students merely because of some "classification", which had no correlation to an extension of the academic career of such students, would invite a wholesale avoidance of this extraordinarily important rule.
>
> 4. While the testimony was to the effect that this student was not an outstanding basketball player, in all likelihood he would be projected as a starter for the Piscataway Varsity Basketball Team this year. Therefore, granting a waiver would in all likelihood result in the displacement of an otherwise eligible student on the team and undermine the purposes of the eligibility standards.
>
> 5. While this student did pass the minimum amount of academic subjects during his junior year (25 credits), he did so only after attending summer school, in the wake of failing two subjects. At the same time, this student was absent for 25 days, without any adequate explanation presented to the EAC. To the EAC, this evidences a lack of emphasis upon academic concerns by the student and does not clearly demonstrate the necessity of waiving the age rule. The EAC is fully cognizant of the admirable tutoring program established by Coach Shoeb for his students, but that program could be freely available to this student, even if he were serving as a manager or in some support capacity for the basketball team.
>
> (Respondent's Letter Brief, at pp. 2-3)

Based upon the aforesaid reasons, NJSIAA argues that the Commissioner should not disturb the findings of its Eligibility Appeals Committee since the rule it seeks to uphold is a valid and sound regulation designed to prevent "red shirting," assure fairness in competition, protect the health and safety of competitors and prevent the displacement of younger students.

While acknowledging the NJSIAA's sensitivity to ensure that students retained because of their handicaps are not disparately impacted by the age rule, NJSIAA points out the necessity for assuring that classification is not misused. For that reason, NJSIAA points out that the circumstances under which a student is

classified are carefully assessed. "To prevent 'Red Shirting' WAIVERS WILL NOT BE GRANTED WHERE THE CLASSIFICATION OCCURRED JUST PRIOR TO/OR DURING THE STUDENT'S SECONDARY SCHOOLING." (Handbook, at p. 60, as cited in Respondent's Brief, at p. 7)

In urging the Commissioner to uphold the rule in question, NJSIAA cites Marco Leyton v. NJSIAA and Carteret Board of Education, 1984 S.L.D. 485 as a precedent for the efficacy of the "age rule" and its salutary purposes. The NJSIAA further takes issue with petitioner's implication that the Commissioner's findings in Leyton that participation in athletics was a privilege and not a property right is questionable. The NJSIAA notes that the article entitled "Inquiry and Analysis" attached to petitioner's brief actually stands for the proposition that the great majority of court cases have held that students have no property interest in participating in extracurricular activities, as recently upheld in Palmer et al. v. Merluzzi, et al 689 F. Supp. 400 (D.N.J. 1988), aff'd 868 F. 2d 90 (3rd Cir. 1989)

The NJSIAA argues that accepting petitioner's contentions relative to the granting of waivers for persons classified, even for minimal disabilities, would open the door to thousands of waiver requests to participate after reaching the age of 19. Since Leyton was denied a waiver despite his having repeated the fourth grade because his family was forced to move for political reasons, the NJSIAA argues that the same principle should be applied to C.G. in this matter.

Ultimately, the NJSIAA urges the Commissioner to decide this matter consistent with other decisions rendered by him in which he has refused to substitute his judgment for that of the NJSIAA where the organization has followed its duly promulgated rules and afforded procedural due process. The NJSIAA urges the Commissioner not to accept the premise that mere classification entitles petitioner to a waiver when such premise is not accompanied by compelling reasons which would demonstrate "truly extraordinary circumstances." In the NJSIAA's view, such compelling circumstances could only be demonstrated by a clear showing that C.G. was prevented from participating for four years because of a bona fide handicap. In the NJSIAA's view, no clear showing of circumstances beyond the control of C.G. were demonstrated as elaborated upon by the NJSIAA in the decision it rendered after its October 11, 1989 hearing and cited herein on page five of this decision.

In support of its position that no evidence exists to demonstrate that C.G.'s failures in grades 2 and 4 were a result of his perceptual impairment, the NJSIAA contends that the testimony of Mr. Halper, Piscataway school psychologist, merely speculates that such was the case and admitted the possibility of several reasons for C.G.'s academic deficiencies.

Commissioner's Decision

The Commissioner has carefully reviewed the arguments of the parties as set forth in their briefs, as well as having reviewed the transcripts of the hearings before the Eligibility Committee of the NJSIAA. Based upon that review and fully mindful of the

standard of review which prevails in matters relating to the appeals from application of the rules, regulations and Bylaws of the NJSIAA, the Commissioner reverses the determination of the Eligibility Committee and directs the granting of a waiver to C.G. While the Commissioner has, as pointed out by the NJSIAA in this matter, consistently avoided substituting his judgment for that of the NJSIAA when that organization is seeking to enforce a duly promulgated and reasonable rule, he has done so with the clear understanding that such support does not extend to determinations by the association which are arbitrary or without a rational basis.

In reaching the above determination, the Commissioner is unpersuaded by the logic of the NJSIAA's reasoning. The NJSIAA's contention that petitioner's repetition of grades 2 and 4 does not constitute evidence of the existence of circumstances beyond his control simply because those failures preceded his actual classification fails to recognize the nature of perceptual impairment as a handicapping condition. The NJSIAA's position seems to view such handicapping condition in the same manner as one would view the contracting of a contagious disease, namely that the patient could reasonably be presumed to be well until the disease manifests itself. Perceptual impairment may well be present from birth but remain undiagnosed.

Notwithstanding the fact that the NJSIAA makes much of the fact that Mr. Halper would not state with absolute certainty that petitioner's failures in grades 2 and 4 were definitively a result of his perceptual impairment, it is likewise clear that in Mr. Halper's professional judgment those failures were attributable to what was later diagnosed as perceptual impairment. (See 12/6/89 Transcript 105:5-7.)

Further, the NJSIAA's implication that petitioner's failures could well be attributed to a lack of motivation is dealt with by Mr. Halper as follows:

> I think if [C.G.] had been labeled unmotivated, I have seen many children with learning disabilities for attention deficit disorder, which is a medical term described in that fashion, you know, they're described as lazy, uninterested, et cetera. I think first of all, kids, people who have learning disabilities really have difficulty attending, processing information, et cetera. What it might appear to someone as a lack of motivation.
>
> On another level, it's easier for a child to take the stance of being called unmotivated or lazy rather than dumb, as he probably would have seen himself. The fact that he does not achieve, which many unfortunately learning disabled people, you know, even adult lives, walk around with that feeling inside of them.
>
> (12/6/89 Transcript 106:8-23)

In the final analysis, the Commissioner agrees with the position set forth by petitioner that he should not be currently penalized for the fact that his handicapping condition was not diagnosed until the eighth grade. If petitioner is presently learning handicapped by virtue of his perceptual impairment, it is reasonable to assume that the academic difficulties experienced, both currently and in the past, are a direct result of that handicapping condition. Such a finding constitutes the basis for determining that his failures were the result of circumstances beyond his control and provides the justification for granting the waiver permitted by the NJSIAA rule.

In reaching the conclusion above, the Commissioner finds little merit in the argument raised by the NJSIAA that the granting of a waiver in this matter will open the door to wholesale avoidance of the age rule "***merely because of some 'classification', which had no correlation to an extension of the academic career of such students***." (Respondent's Brief, at p. 3) Initially, the NJSIAA's reasoning in this regard is based upon the misconception that perceptual impairment is in some manner an insignificant handicap which could not be responsible for a student's failure to academically progress in a satisfactory manner. If such were the case, there would be no need to provide special remedial service to pupils such as C.G. who is in the NJSIAA's words "***in the average I.Q. category and has no physical impairments whatsoever, other than the classification of 'perceptual impairment.'" (Id., at pp. 2-3) Such is obviously not the case since the New Jersey State Legislature and the State Board of Education have determined perceptual impairment to be one of the categories of handicapping conditions which is state aided and for which specialized services are required. Further, the Commissioner finds little merit in the argument that granting a waiver in this instance will automatically open the door for all 19-year-old classified students to be able to extend their academic eligibility. Each individual request for a waiver must be considered on the specific facts which prevail and the Commissioner's decision herein is not meant to extend beyond the factual matters present in this case.

The Commissioner likewise finds no merit in the NJSIAA's argument that a younger player will be displaced by the granting of a waiver to C.G. since in any circumstances in team athletics, regardless of age, the less able athlete is "displaced" by the more able. As petitioner points out "***it is not fair to deny C.G. the opportunity to play simply because he might be taking the place of another player.***" (Petitioner's Brief, at p. 8)

Finally, the Commissioner finds the NJSIAA's reliance on Leyton, supra, to be misplaced since the sole issue to be decided in that matter was whether the failure to grant a waiver to Leyton and the application of the age rule violated N.J.S.A. 18A:38-1, which entitles residents over five and under twenty to a free public education. In deciding the Leyton case, the Commissioner essentially held that 18A:38-1 applied only to the constitutionally protected right to a free public education and not to the privilege of competing in interscholastic athletics. Thus, NJSIAA's right to

promulgate such a rule was upheld. In no way did the aforesaid decision implicate an attempt by Leyton to demonstrate that the extension of his high school athletic career was justified for reasons beyond his control.

Consequently, and for the reasons contained herein, the Commissioner directs that a waiver be granted to C.G. to permit him to participate on the Piscataway High School basketball team.

IT IS SO ORDERED this _____ day of January 1990.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7007-89
AGENCY DKT. NO. 292-9/89

MURPHY BUS SERVICE:
COAST ANSWERING, INC.:
NORTH SHORE TRANSPORTATION, INC.:
R. HELFRICH & SON, CORPORATION:
PAT KEELAN & SONS, INC.:
MICHAEL A. LOORI BUS CO., INC.:
MILU BUS SERVICE, INC.: AND
UNLIMITED AUTO, INC.,
Petitioners,
v.
MONMOUTH COUNTY EDUCATIONAL SERVICES COMMISSION AND
PARA TRANSIT,
Respondents.

William Himelman, Esq., for petitioners (Himelman, Hurley & Himelman, attorneys)

Peter P. Kalac, Esq., for respondent Monmouth County Educational Services Commission (Kalac, Newman & Lavender, attorneys)

Martin M. Barger, Esq. for respondent Para Transit (Reusille, Mausnner, Carotenuto, Bruno & Barger, attorneys)

Record Closed: November 1, 1989 Decided: November 30, 1989

BEFORE **JEFF S. MASIN**, ALJ:

This proceeding arises from a petition filed by the various petitioners challenging the award of contracts for bus service for vocational school and special education transportation. Monmouth County Education Services Commission awarded the

contracts to Para Transit following a bidding procedure held under the provisions of N.J.S.A. 18A:39-1 et seq., which provides, in relevant part, that contracts for school bus routes shall be awarded to the "lowest responsible bidder." The petitioners generally contend that the Board of Education's bidding process did not provide a "common standard" for all bidders, as required by the statute and N.J.A.C. 6:21-15.2(c).

Initially, this matter began when the petitioners filed a petition with the Commissioner of Education on September 18, 1989. The respondent Para Transit filed an answer on September 25. An application for emergent relief was presented before Administrative Law Judge Jeff S. Masin on September 22, 1989. Judge Masin issued an order denying emergent relief on September 25, 1989. The Commissioner of Education affirmed the judge's decision, denying relief by decision of October 26, 1989.

A prehearing was held following the oral argument on the application for emergent relief on September 22, 1989. A prehearing order was issued on September 25, 1989. The matter proceeded to hearing before Judge Masin on October 20, 1989 at the Monmouth County Courthouse in Freehold and continued to conclusion on November 1, 1989 at the Monmouth County Hall of Records in Freehold. The record closed following the conclusion of the hearing on November 1.

ISSUES

The prehearing order sets forth the issues for consideration as follows:

a) Were the bidding documents upon which the bids were submitted sufficient to provide all potential bidders with a "common standard for competitive bidding?"

b) Were the bidding specifications ambiguous?

c) If the contracts were improperly awarded, what is the appropriate remedy?

THE BIDDING SPECIFICATIONS

The contracts in question were to be awarded by the Monmouth County Educational Services Commission for special education and vocational education transportation. The bid specifications are contained in Exhibits P-1 and P-2 in evidence.

The relevant language is the same in each document. The term of the contract under each was September 1989 through June 1990. The bids were to be based on a per diem cost. All bids were opened on August 23, 1989 at the office of the Board Secretary of the Monmouth County Educational Services Commission in Freehold.

The standard specifications require that "bidders may bid on one or all routes; however, a separate Bid amount must be specified for each route. (emphasis in the original) Section VII of the vocational specifications "BASIS AND AWARD OF CONTRACT" provided

> A. . . .
>
> B. . . .
>
> C. For each route bid upon, the bidder shall state a single sum which shall be the bidder's pre diem rate for charge for the use of the vehicle and for all transportation services for all pupils eligible under the contract. The bid shall also stipulate the additional cost per Vehicle Mile for individual extensions of this route which are in excess of 10% of the vehicle mileage originally established by these specifications. . .
>
> D. . . .
>
> G. Where alternate bids are specified, the Board of Directors may elect to award the contract(s) on the basis of either the base bid or the alternate bids, whichever in its judgment it shall determine to be in the best interest of the Board of Directors.

The special education bid specifications contain a similar section, VI, which provided

> A. The contract shall be awarded on the basis of cost per vehicle. Any change in the described route resulting in an increase or decrease, shall be adjusted in price on the basis of an extension cost per mile.
>
> For each vehicle bid upon, the bidder shall state the single sum which shall be the bidder's per diem rate or charge for the use of the vehicle and for all transportation services for all pupils eligible under the contract. The bid shall also stipulate the additional cost per vehicle mile for the individual extensions of this route which are in excess of 10% of the vehicle mileage originally established by the specifications. . .

B. . . .

F. Where alternate bids are specified, the Board of Directors may elect to award the contract(s) on the basis of either the base bid or the alternate bids, whichever in its judgment it shall determine to be in the best interest of the Board of Directors.

Each of the petitioners submitted a bid for one or both of the contracts. Para Transit also submitted bids. However, whereas all of the other bidders bid by submitting separate bids for each specified route in accordance with the mileage of the standard specifications, Para included as well a bulk bid for a number of routes which gave a discount to the Commission if it awarded Para the group of routes bid upon. None of the other bidders submitted such a bulk bid. It is the submission of this bulk bid which is at the heart of the controversy between the parties in this case. The petitioners allege that the specifications did not permit bulk bidding and that therefore the bid submitted by Para was not in conformity with the specifications. The petitioners charge that by awarding the contract to Para based upon the bulk bid, the Commission treated Para differently, that is allowed it to bid on a separate standard, not on a common standard as required by the bidding law, and therefore violated their rights under the bidding statutes. As such, they call for Para's award to be vacated and for the entire bidding process to be thrown out and restarted or, in the alternative, for the bids to be awarded to those bidders who were the lowest responsible bidders on each of the routes which were awarded to Para.

The respondents contend that the language of the bid specifications provided for the opportunity for a bidder to submit "alternate bids" and therefore, since Para Transit decided to submit a bulk bid, it was within its rights under the language of the specifications and did nothing wrong. Since the specifications permitted "alternate bids" and all bidders were provided with the specifications, they did in fact have a "common standard" and cannot complain because they chose not to submit bulk bids when Para Transit did. Further, they point out that there is a history of bulk bidding by various contractors, including some of the petitioners in this case, in prior years for these contracts and therefore the petitioners can hardly complain since, according to the evidence presented, the "alternate bids" language has existed in the bidding specifications without change since the bidding process for these contracts began in 1981.

As noted below, the petitioners do not dispute that the language concerning alternate bids has in fact existed in the bidding specifications over the years and that some of them have in fact submitted bulk bids and been awarded contracts based on those bids. However, they argue that recent developments in connection with the bidding process made it appear that if the Board desired any sort of alternate bids it must specifically and directly say so in its bid specifications, setting forth the nature and details of such potential alternate bids, and that the generalized language contained in the specifications P-1 and P-2 was insufficient to permit any other bids other than those specifically called for, that is, bids based on an individual route basis.

EVIDENCE

THE PETITIONER'S CASE

The petitioners' first witness was Ilse Wishner, director of special projects for the Educational Services Commission who oversees the transportation program. She identified the bid specifications used for the August 1989 contracts and acknowledged that she had drawn the specifications. She was never advised by Mr. Somers, the representative of Para Transit, that it intended to file a bulk bid and the issue of bulk bidding on this contract was never raised by anyone.

Ms. Wishner was aware of a meeting held at the Howell Township Fire Hall four months prior to the bids at which representatives of the Department of Education's Transportation office had spoken to contractors. She was not present at that meeting.

Para Transit received 34 special education routes as a result of its bid. Among these were routes 9030 and 9031, about which further evidence was presented from other witnesses which will be discussed below. The total amount of Para Transit's bid on a per diem basis was $3236.

John Murphy, president of Murphy Bus Service, testified that he had bulk-bid on prior occasions "in order to state his objections to it." He had received a contract under a bulk bid prior to 1989. He was present at the Howell Township meeting with the State Department of Education representatives. His understanding was that all business

administrators, transportation directors and contractors in the County had received notice of the meeting. Among the speakers was Carl Franks of the Bureau of Pupil Transport. According to Murphy, Franks declared that bid specification forms must explicitly note the nature of bids which are sought. Any entry by a bidder on a bid sheet of some other type of bid than that specifically and explicitly requested by the specifications would have his bid voided. Sample forms were handed out. This form, P-5 in evidence, specifically contains a section on page 17, a portion of the Bid Sheet, which specified "bulk bid" and provided a space to put in a percent deduction for each route.

Murphy noted that the bid sheets for the special education contracts for the Commission contained alternative methods of bidding based on per diem or per annum increase/decrease and on a mileage or a vehicle or a pupil basis. According to Murphy, he understood that these were the alternate choices which were allowed. The bidding documents said nothing at all about bulk bids.

Murphy was present at the opening of the bids on the 23rd of August. Immediately thereafter, route 9030, which was a part of the bulk bid awarded to Para, was re-advertised under a new set of specifications to be bid on two weeks later. Route 9075 was listed on the new specifications and cancelled out route 9030, but it was the same child going to a different school.

Murphy acknowledged on cross-examination by counsel for Para Transit that the same bid form and language had been used in prior years and was probably used in 1985 when he bulk bid and was awarded the contract. However in 1989, as the result of Mr. Franks' comments at the firehouse meeting he thought that the kind of bulk bid alternative which had previously been permitted by the Commission was prohibited in the absence of any clear and direct mention and description of such in the specifications. In addition, Ms. Wishner had said that since he objected to bulk bids she wouldn't accept them. There were no witnesses to this conversation, which occurred at the County offices in connection with bulk bids sometime prior to 1989.

Murphy was queried as to whether he had contacted the County offices to ask about whether bulk bids were being solicited. Since the form said nothing about them he did not call the County, assuming that they would not accept bulk bids. In addition, he found that Ms. Wishner ran things the way she wanted and gave orders which you had to follow and he did not think he would get anywhere if he called up and asked any questions.

The witness insisted that the "alternate bid" language in the specifications meant the per diem, per annum, etc. choices set forth on the bid sheet. He acknowledged that in the past he had submitted bulk bids in response to the "alternate bid" language anyway and had received contracts under these bids.

Mr. Murphy stated that his understanding was that what Mr. Franks had said at the firehouse meeting was "the law." He believed that the sample forms "should be" used by every district in the County because Franks had said "these are the guidelines that must be followed." In Murphy's understanding any contractor's "own alternatives" would void the bid.

According to Murphy's recollection, a representative of Para Transit was present at the Howell meeting. He believed this was someone named Earl, who he believed was the dispatcher for Para Transit.

Following the bids on the contracts in question, Mr. Murphy bulk-bid on a later contract in September of 1989. The specifications had been changed for that contract. The specifications, which were dated August 30th, listed the bid opening as occurring on September 11. The language in the specifications for the September 11th contract was changed from that of prior specifications in that the language in paragraph VII. G. now read "where alternate bids are offered, . . .," as opposed to the previous "where alternate bids are specified, . . ."

Murphy objected to the bulk bid process existing prior to September 1989 in that he did not know what particular kind of bulk bid any contractor would offer. Since contractors could pick and choose the routes which they bid on they could also pick and choose those which they determined to bulk-bid and therefore bulk bids might be offered on any number of routes in any combination. Other contractors would have no way of knowing which combinations would be the subject of any particular bulk bid, thus preventing a common basis for bidding.

Representatives of other petitioner companies testified as well. Some of these had previously been aware of bulk bids, had offered them, and had in some cases received contracts under the bulk bids. Peter S. George, Sr., with the Milu Bus Service, Inc. testified that his understanding as to the situation concerning the bidding process was the same as Mr. Murphy's. He had attempted to call Ilse Wishner after receiving the

specifications, but was told that she was on vacation and would be back on the day before the bids would be opened. He had a "multitude of questions" on the specifications. The specifications produced by the Commission did not appear to "apply to the specifications, etc. mentioned at the meeting." When he called Ms. Wishner, her assistant said that he would have to abide by the specifications, to which he responded that they were "not complete." He was told that the assistant could not give him an answer, as Ilse was not there.

George explained that the specifications which he received from the Commission were not like those which had been contained in Mr. Franks' sample. Franks had explained that the Boards were "not to abide by handwritten specifications" and that deviations would void bids. George was unsure as to any recollection of previous bulk bids being accepted by the County and did not think that he could bulk bid.

Katherine Henderson of Coast Answering, Inc. testified that she was also present at the Franks meeting. Her understanding was that the Boards had to clearly state in the specifications exactly what kind of bids they were seeking. To her, "alternate" did not mean bulk bidding, but instead referred to the per diem, per annum, etc. choices. Ms. Henderson did call Ms. Wishner with questions regarding the specifications and the routes, but these questions did not have to do with the bulk bid issue because she assumed that no bulk bids were permitted.

Jacob Helfrich, of R. Helfrich & Son, testified that he was aware of prior bulk bids and awards. He believed that the specifications had to specifically call for bulk bidding in order for it to be permitted. The only change in the forms over the years was the addition of the alternatives on the last page of the special education forms several years ago. However, Helfrich could recall no specific comments about the bulk bidding issue at the meeting with Mr. Franks. He assumed that because the sample contained a line for a bulk bid and since it was not specified as such in the Commission's bid specifications or bid form that bulk bidding was not permitted. As far as Helfrich understood Franks' comments he believed that you "could not write in anything anymore." After reviewing the specifications and bid form he did not think that the Commission would accept bulk bids and therefore he did not call to check. In fact, he had never thought that bulk bids were allowed and had never entered a bulk bid with the Commission.

THE RESPONDENTS' CASE

The Educational Services Commission presented Bruce Rodman, business administrator and board secretary since 1981. The Commission has been in the transportation business since 1982 and has worked with a basic set of specifications, originally drawn up by Rodman and Wishner, to which only minor modifications have been made over the years. There have been some minor changes in the boilerplate, but no change regarding the "alternate bid" language. In Rodman's mind "alternate" meant a bulk bid. The word "specified" related to how the bidder wished to respond to the bid request. No one ever complained about a lack of understanding of what the phrase meant and bulk bids have been awarded and rejected over the years. A recent change in the format occurred after the bid opening of August 23rd when he changed the language because some contractors contended that the language was not clear enough. The word "specified" was changed to "offered."

On cross-examination the witness estimated that some 300 bids had been offered by contractors over the years in response to various contract proposals. The Board had awarded approximately three bulk bid contracts during that time.

On redirect examination Rodman again referenced the alternate bid language of paragraph VII. G. and said that this was really an opening to bidders to offer whatever bid format they conceived of.

Ilse Wishner again testified, this time as a witness for the Commission. She noted that the main criteria for the award of a contract was always the total cost; a route-by-route comparison would be made and then the Commission would take into consideration the bulk bid and make the award based on a determination of who the lowest responsible bidder was for each route. She denied that it would be necessary for any contractor to know what type of bulk bid another contractor was intending to bid on. She felt that elimination of bulk bidding could eliminate the "little guy" if bulk bidding was required on all routes.

According to Ms. Wishner, her representatives at the Franks meeting could recall no discussion regarding the impermissibility of bulk bidding. This contract was the first one which the Commission awarded after the Franks meeting. No contractors called her or her office to complain or question about the bulk bid issue.

Wishner explained that route 9030 was for a student who was removed from the route just prior to the contract award. 9031 was a wheelchair route from Union Beach, which had called two or three days before to say that they had made alternate arrangements. Route 9030 was not bid again, but instead another route was bid for the same child going to a different destination. The Commission would be deducting ten percent from the line bid to compensate for the fact that 9030 was not being run.

Roger J. Somers of Para Transit, owner/secretary of the company for 15 years, testified that he had submitted bids both for Para and for Yellow Cab Company, with which is also associated. He was aware that there was an objection to the bulk bids presented by Mr. Murphy at the opening of the August 23rd bids.

REBUTTAL

On rebuttal James C. Keelan, vice president of operations for Pat Keelan & Sons, testified that he was present at the bid opening and protested the bulk bid on the basis that the specifications did not clearly request bulk bidding. He had not been present at the Franks meeting, but was told that if the bids did not clearly specify any particular kind of bid any deviation from the specification would be rejected.

DISCUSSION

N.J.S.A. 18A:39-1 authorizes school boards to provide transportation of pupils remote from schools. This may be done by contract with providers of transportation service. N.J.S.A. 18A:39-3 provides that contracts must be awarded following advertising of bids where the transportation cost will exceed a dollar amount which is determined in part based upon the Consumer Price Index. Contracts must be publicly advertised for bids and "shall be awarded . . . to the lowest responsible bidder."

The purpose of bidding is discussed at N.J.A.C. 6:21-15.2(c), which reflects the discussions of the subject by the courts of the State of New Jersey:

> (c) It has been held by the courts that the enactment of N.J.S.A. 18A:39-3 et seq. pertaining to bidding for transportation, evinces a State policy to encourage free and intelligent competitive bidding. The purpose of bidding is to prevent fraud, favoritism and extravagence, to safeguard the taxpayers, and to protect the lowest responsible bidder. To

> accomplish this purpose, the specifications must be definite and precise. Common standards must be set up. In order that all bidders shall be on an equal basis, the same information must be furnished to all. Numerous bidders create competition. Therefore, the specifications must not restrict healthy bidding and make competitive bidding difficult.

In Greenberg v. Fornicola, 37 N.J. 1 (1962) the Supreme Court discussed the standard for bidding.

> Competitive bidding is designed to obtain the best economic result for the public. (citation omitted) Inherent is the requirement that the public body shall prescribe a common standard on all matters that are material to the proposals, to the end that interested bidders may bid intelligently and will be induced to bid by the promise of impartiality which only specifications of that quality can give.

The evidence presented in this case establishes that the Commission has historically accepted bids presented on a bulk basis and has on occasion awarded contracts to such bidders. No one disputes this fact. In addition, there is no dispute that since approximately 1982, when the Commission got into the transportation business, its specifications for vocational and special education transportation have read as they did at the time of their issuance on August 9, 1989, that is, the specifications provided a requirement for an individual bid on each route and also contained a paragraph which began "Where alternate bids are specified, . . ." The undisputed testimony of Bruce Rodman and Ilse Wishner establishes that they drew the specifications and as Rodman put it, they believed that the "alternate bids" language allowed bulk bidding and in fact, in Rodman's view, allowed any sort of bid which a contractor might deem appropriate to submit. Thus, in the view of those in charge of the bidding process from the Commission's standpoint, the "alternate bids" language was an open invitation to contractors to be inventive, ingenious, constructive, etc. in submitting proposals.

It is equally obvious from the testimony that most of the contractors who regularly bid for the Commission's contracts were aware of the fact that bulk bids were being submitted on occasion and that some of them, whether they fully agreed that the bids were acceptable under the language of the specifications or not, chose to submit such bids. Therefore, the presentation of a bulk bid by Para Transit for the August 23 contracts could not be a surprise to the other contractors in light of the prior history, except for their expressed viewpoint that the "legal" situation surrounding the bidding

process had changed. The testimony of Murphy and the other company representatives concerning the meeting with the State representative and their understanding of his comments concerning the necessity of great specificity with respect to specifications and bid forms, forms the basis for their claim that if nothing else, they were led to believe that the usual situation with respect to bids under the "standard" language of the Commission's specifications could not be the same, that is, it would no longer be acceptable under that language to submit bulk bids since they were not specifically mentioned in either the specifications or on the bid forms, as they were on the sample form distributed by Franks.

There is little question that except for the "alternate bids" language submission of bulk bids under the standard specifications used by the Board would be unacceptable. The specific language concerning the necessity of submitting individual bids for each route neither implies nor would support a bulk bid. In Coast Cities Student Transport, Inc. v. Board of Education of the Lower Camden County Regional District NO. I, et al, EDU 3643-81, Initial Decision October 5, 1981 affirmed by Commissioner November 17,1981, Honorable Lillard E. Law, ALJ, ruled on a matter in which the Board had solicited bids for 40 pupil bus transportation routes for the 1981-82 school year. Coast Cities submitted bids on 30 bus routes specifying a unit cost for each route and then stating "If awarded all the routes which we have bid, you may deduct five percent from the amount bid for each route." Judge Law reviewed the history of bidding for the Board's contracts, noting that the bidding specifications specifically called for a unit price for each unit bid and further provided that any explanations desired by a bidder had to be requested in writing. In addition, the specifications set forth no provision for a "volume discount bid" or a bulk bid, and that such a bid presented by the petitioner was "not in compliance with the Board's specifications . . . ." The "petitioner reached beyond the meaning and intent of the Board's specifications and effectively attempted to deny all prospective bidders with a common standard for competitive bidding."

Coast Cities is instructive, but because of certain factual distinctions it is not necessarily dispositive of the present matter. There is no indication in the decision that the specifications drawn by the Lower Camden County Regional School District contained the "alternate bids specified" language found in the Commission's specifications. Thus, the question for decision here is whether that language was clearly an invitation to all bidders to submit bulk bids, whether it advised all of them equally that such bids would be permitted, whether it was ambiguous in meaning, whether the past history of bulk bidding

for Commission contracts clarified the meaning of the language and whether, in light of the information purportedly conveyed at the Franks meeting the situation concerning the language was either clarified so as to make the contractors correctly understand that if bulk bids were not specified, they were not acceptable, or on the other hand, whether the meeting served to make the situation sufficiently ambiguous in light of the continuation of the "alternate bids specified" language in the Commission's specifications so as to confuse the contractors and make the bidding process unfair.

Having considered the evidence, I am convinced that the submission of a bulk bid under the specifications drawn by the Commission was never clearly authorized. While it may have been the intention of Rodman and Wishner to allow bidders a great deal of freedom in drawing up their own proposals, it is clear that within the confines of public bidding such liberality is not favored. Instead, great specificity, tight control, clear direction is the norm. Although the contractors have on occasion submitted bulk bids and the Commission has accepted them, this past practice cannot served to legalize a practice which is outside the confines of law. The mere fact that no one has complained to the Commissioner of Education in the past concerning the conduct of the Commission with respect to bulk bids does not prevent such claims from being asserted at this time.

I **FIND** that the bid specifications of the Commission as they were drawn and used over the years up to and including the August 23 contracts did not authorize the submission of a bulk bid. I **FIND** that although the practice has been to allow some contractors to submit bulk bids and on occasion to award contracts based on a bulk bid basis, I **FIND** that such practice was not supportable under these specifications and was therefore contrary to law. In addition, I **FIND** that generalized language concerning "alternate bids" without specification of the nature of such alternatives, is too vague a specification, indeed is hardly a specification at all, and therefore does not provide a "common ground" upon which all bidders may, on an equal basis, base their proposals.

In the specific context and history of this case, the discussions which I **FIND** were held at the Franks meeting are of interest, but not decisive. Although it is not evident from the testimony presented that Franks specifically discussed bulk bids, it is undisputed that he did talk about the need for precise specifications, and the danger that responses by way of bids which contained additional or variant proposals would be void. It does not appear that Franks clearly suggested to his listeners that some new statutory or regulatory provisions existed to support what he was saying, but instead it appears that he

was presenting his and/or the Department's view of the current state of the law as reflective of existing statutes, regulations and case law. Indeed, no one has presented any evidence of any such new provisions. This case is therefore decided based upon the law as it existed prior to the announcement of August 9th and as it continues to exist today. The conclusion that the Commission was permitting unauthorized bids and accepting some of them in prior years is not affected by anything which Franks may have said or implied. At most his discussion brought to the forefront the concern for specificity and alerted the listeners to that concern. Obviously, many of the contractors who have testified in this hearing listened carefully and found that the language of the specifications of August 9 was not clear enough to serve as a legitimate invitation to the submission of bulk bids. Why Mr. Somers chose to so bid is not clear, particularly in light of the testimony that although he was not present at the meeting, a representative of his company was there.

For the reasons expressed, I **CONCLUDE** that the submission of a bulk bid by Para Transit was unauthorized and unsupportable. Such a bid exceeded the specifications as they were drawn by the Commission. The "alternate bids are specified" language which has been in the bid specifications for so long was a vague and inappropriate statement which might have made sense only if the Commission had specified possible alternatives which could be presented. In the absence of such, the language left the door open to whatever contractors deemed appropriate to submit. This is hardly a proper way to create a "common standard." For these reasons, I **CONCLUDE** that Para Transit's bulk bid was improper and should have been **REJECTED.**

CONCLUSION AND ORDER

While one possible alternative remedy in this case would be to throw out the entire bid process and have the matter re-bid, a more equitable arrangement appears to be to allow each of the lowest responsible bidders for each of the routes advertised to receive the benefit of their single route bid. Thus, it is **ORDERED** that the Commission shall re-award the contracts for the individual routes based upon its determination of the lowest responsible bidder for each route based solely on the single route bids. It appears that the documentation contained in Exhibit P-4 is the Board's listing of the line-by-line award as it would have been rendered had it not been for Para Transit's bulk bid.

Attached hereto and made a part of this decision is an addendum which lists the routes and the lowest responsible bidder on a line-by-line basis as set forth in Exhibit P-4[1]. The contracts shall be awarded to these vendors[2].

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

DATE — **JEFF S. MASIN, ALJ**

Receipt Acknowledged:

12/4/89
DATE — DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 5 1989
DATE — OFFICE OF ADMINISTRATIVE LAW

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1 There is no listing for V911, 9038 or 9053. Perhaps these were not bid or were deleted prior to the opening of bids.

2 It has not been clearly demonstrated that there was any impropriety with respect to routes 9030 or 9031. In light of the voiding of the bulk bid, the issue regarding the treatment of these routes appears to be moot.

MURPHY BUS SERVICE ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
MONMOUTH COUNTY EDUCATIONAL SERVICES COMMISSION, MONMOUTH COUNTY, AND PARA TRANSIT, INC.,	:	DECISION
RESPONDENTS.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions seeking reversal of the initial decision were filed by both respondents, and a reply to the exceptions of the Monmouth County Educational Services Commission (hereinafter "Commission") was timely filed by petitioners as a group.

In its exceptions, the Commission first argues that the initial decision re-awarding each individual contract to the lowest responsible bidder would in fact be a subversion of the very public bidding policy it seeks to uphold, namely to prevent fraud and favoritism, to safeguard taxpayers and to protect the lowest responsible bidder. In the instant matter, the Commission argues, there is no question of fraud or favoritism, yet the Administrative Law Judge would make an award that would cost taxpayers an additional $10,000 and cause harm to the holder of a low bid submitted in good faith according to both past practice and applicable specifications. (Exception No. 1)

The Commission next objects to the ALJ's characterization of Coast Cities, supra, as instructive if not dispositive of the instant matter. In that case, the Commission contends, the contested bid was declared invalid because it went beyond the stated specifications by submitting a bulk bid; whereas in this case, bulk bids were authorized by both past practice and the language of the bid specifications. (Exception No. 2)

The Commission further argues that the ALJ erred in finding that the commission's past practice of accepting "some" bulk bids under the same specifications as were used in the present contested bids was not supportable under those specifications and was therefore contrary to law. The Commission notes that all contractors were permitted to submit such bids, and the fact that only some did should not lead to a conclusion that the Commission acted "contrary to law" by discriminating among contractors. (Exception No. 3)

The Commission finally objects to the ALJ's construal of the "common standard" concept and his reliance on Greenberg, supra, to find against the Commission. The Commission contends that "common standard" within the meaning of Greenberg pertains to "those

matters that are material to the proposals," that the Commission specified precisely what it expected of bidders in such matters, and that those specifications were common to all. The fact that some bidders chose not to invoke the "alternate bid" provision, the Commission avers, does not change the fact that it was offered to all bidders on a like basis. The ALJ's finding that the language of this provision was vague, inappropriate and improper as a common standard "begs the question," according to the Commission. The matters which were material to the proposals were common to all bidders; how the bidders packaged their proposals was a matter of choice. (Exception No. 4)

To these exceptions, Respondent Para Transit adds two concerns of its own. First, it contends, the same documents and procedures have been used by the parties to this matter for years, and no complaints were heard when petitioners benefited therefrom by receiving contract awards based on bulk bids; yet, these same petitioners now seek to have Para's award overturned for following the very same practice. Second, it asserts, the ALJ's proposed remedy doubly penalizes Para by taking from it both routes it believed it had been awarded and routes it might have bidded on if not for its commitment to the Commission. Petitioners, on the other hand, are allowed to keep both the re-awarded Commission contracts and the contracts not bidded on by Para. Therefore, fundamental fairness argues that if the award to Para cannot be upheld, the Commission contracts should be re-bid in their entirety.

In reply, petitioners reiterate the need for clarity in specification language and urge support of the ALJ's determination that the alternate bid language used by the Commission was too vague to constitute a lawful common standard. Moreover, they assert, a plain reading of this language ("where alternate bids are specified") places the onus for identifying how and where such alternatives may be offered on the one who prepares the specifications, not on the one who responds to them; the Commission itself recognized this, petitioners claim, by later changing the wording of its language for future bid specifications to "where alternate bids are offered." Further supporting petitioners' case, they assert, is the fact that the bid sheets for the disputed con- tract contained no location for bulk or discount bids, and that Para Transit's bulk bid was handwritten on each bid sheet. (Reply Excep- tions, at p. 1-2)

With respect to respondents' past practice argument, petitioners note that in fact bulk bids were relatively rare (three occasions out of approximately one hundred bid openings) and that bidders not familiar with the Commission or its past practices, relying solely on the plain language of the bid documents, would certainly not have been able to submit bids on common ground. (Id., at p. 2)

Finally, petitioners maintain that the initial decision advances, rather than subverts, public bidding policy in standing for the proposition that bid specifications must be clearly drawn and strictly construed to permit all bidders to bid on an equal basis; bulk bidding is not the problem in this case but, rather, the

fact such a bid was awarded when the specifications drawn by the Commission did not permit it. The instant bid, petitioners assert, should be awarded to the bidders who successfully met the stated specifications, not to the bidder who went beyond them. The fact that this may cost the public more money is the result of the way in which the specifications were drawn, petitioners contend, for if bulk bidding had been clearly permitted, other bidders may have submitted discounted bids even lower than the one accepted by the Commission. (Id., at pp. 2-3)

Upon a careful review of this matter, the Commissioner finds that, while he concurs with much of the ALJ's discussion, he cannot accept the ALJ's conclusions regarding the permissibility of alternate bidding under the stated specifications and the remedy to be applied in this case.

The Commissioner concurs with the ALJ that the "where alternate bids are specified" language does not in itself constitute a clear authorization for submission of alternate bids. However, this very vagueness argues against concluding that alternate bids were not allowed, and instead permits the reader to essentially draw whatever conclusion his underlying assumptions and state of knowledge at the time of reading would suggest. In effect, the Commission, knowing its own intentions and past practices, and Para Transit, recalling past experience, read the phrase as "where the bidder chooses to suggest alternatives;" petitioners, on the other hand, fresh from an official, State-sponsored lecture on strictness in public school bidding processes, read the phrase as "where we [the Commission] specify that alternate bids will be taken." Although the absence of form entries or other references to alternate bids works to favor petitioners' reading, as does the specifity of other stated requirements, the actual wording of the contested passage permits respondents' interpretation as well. Thus, the Commissioner cannot share the ALJ's conclusion that alternate bids were not permitted under this passage; rather, he holds that the language at issue was too ambiguous to permit a clear understanding on the part of any reader.

As such, it is plainly unacceptable as a bidding specification, and the Commissioner therefore concurs with the ALJ that it cannot now stand, nor should it have stood in the past, as the basis for awarding or rejecting any bid. However, the Commissioner differs with the ALJ regarding the appropriate remedy for this defect. Because the ALJ viewed bulk bidding as impermissible under the stated specifications, he determined to award the bids as if Para Transit's bulk bid had not been made, thus thwarting any benefit to either the Commission or Para from an action taken outside the purview of lawful bidding procedures. The Commissioner, on the other hand, finds the contested "specification" ambiguous rather than prohibitive, so that it seems unfair to penalize the good faith successful bidder and the public (through higher costs) for a fault lying exclusively in the wording of the Commission's specifications. Instead, the Commissioner prefers that the instant contracts be re-bid, with any and all permissible alternatives (such as bulk discounts) clearly provided for in both the instructions and the

actual bid sheets submitted to the Commission. In this way, all bidders will truly have a common basis for bidding and the public may benefit by a final contract cost at least as low as that of the first Para Transit bid.*

Accordingly, the initial decision of the Office of Administrative Law is reversed to the extent that the Monmouth County Educational Services Commission is ordered to re-bid the disputed contracts after revising its specifications to clearly delineate the nature and extent of permissible alternate bids.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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*Although it does not pertain to the main thrust of his decision, the Commissioner notes that the Commission's Exception No. 3 misconstrues the pertinent passages in the initial decision as an allegation of preferential treatment, when, in fact, the ALJ clearly means only to state the uncontroverted fact that in the past some bidders have submitted bulk bids under the same language being challenged in this case.

The Commissioner further notes that, for purposes of this dispute, the bids of August 30, 1989 are fully valid, as the bid sheet used (Exhibit P-7) clearly provides for bulk bids. However, the Commission is cautioned that its "where alternative bids are offered" language (Exhibit P-6, Section VII-G, and presumably to be used for future bids) is vulnerable to the same type of attack raised in this case, since, in the absence of other indications as to what alternatives are permissible, it is too vague to serve as a clear common standard.

MURPHY BUS SERVICE ET AL.,	:	
PETITIONERS-RESPONDENTS,	:	
V.	:	STATE BOARD OF EDUCATION
MONMOUTH COUNTY EDUCATIONAL SERVICES COMMISSION, MONMOUTH COUNTY,	:	DECISION
RESPONDENT,	:	
AND	:	
PARA TRANSIT, INC.,	:	
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, January 16, 1990

For the Petitioner-Respondent, Himelman, Hurley & Himelman (William Himelman, Esq., of Counsel)

For the Respondent, Kalac, Newman & Lavendar (Peter P. Kalac, Esq., of Counsel)

For the Respondent-Appellant, Reusille, Mausnner, Carrotenuto, Bruno & Barger (Martin M. Barger, Esq., of Counsel)

For the reasons expressed therein, the State Board of Education affirms the decision of the Commissioner directing that contracts awarded by the Monmouth County Educational Services Commission under N.J.S.A. 18A:39-1 et seq. for school bus routes for 1989-90 be rebid following revision of the specifications to clearly delineate the nature and extent of permissible alternate bids.

May 2, 1990

L.G., on behalf of her minor son, W.G.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF BUENA REGIONAL SCHOOL DISTRICT, ATLANTIC COUNTY AND GERALD GRUNWELL,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondents' replies thereto were timely filed pursuant to N.J.A.C. 1:1-18.4 and are summarized below.

Petitioner excepts to the ALJ's conclusion that the 1988 tenure charge filed against Gerald Grunwell is barred by the doctrine of res judicata. She avers that although the ALJ correctly cited the principles of law governing theories of preclusion, such as res judicata, he failed to apply these legal standards to the record of the 1987 proceedings. She contends that the 1987 proceedings are not entitled to preclusive effect and reiterates her claim that she is entitled to full and fair consideration of the December 1988 tenure charge in conformance with the procedural requirements of the Tenured Employees Hearing Law (TEHL), N.J.S.A. 18A:6-10 et seq.

More specifically, petitioner avers that the ALJ erroneously interposed the res judicata bar because the Board's actions of 1987 were not formal proceedings as required for invocation of that doctrine. She points to the fact that although the Board now argues that the proceedings were under the TEHL, the ALJ properly found on page 3 of the initial decision that the 1987 proceedings did not conform to the specific requirements of law. Of this petitioner contends:

> ***The petitioners never filed with the Board Secretary any document that would have triggered formal proceedings under the TEHL. Although the ALJ states that the "[p]etitioner, in an affidavit prepared February 13, 1987, brought these words to the attention of the Board Secretary." Initial Decision, p. 2, there is no factual evidence in the record to support this statement. Rather, the record reflects simply that Mr. and Mrs. [G.], completely unaware of the availability of proceedings under the Tenure Employees' Hearing Law, crafted their own statement memorializing the facts of the February 3,

1987, incident shortly after they met with the school principal on February 4, 1987. Members of the Board were provided a copy of this statement when the [G.'s] and other members of the community brought this matter to the Board's attention during a regularly scheduled Board meeting. Under these circumstances, the factual finding of the ALJ is erroneous.

Even if this affidavit is treated as initiating tenure proceedings, the ALJ correctly found that the February 13, 1987, affidavit prepared by the [G's], and now characterized by the Board as written tenure charges, did not satisfy the statutory requirements of N.J.S.A. 18A:6-11. Specifically, the ALJ found that (1) the affidavit did not contain any designation as a "charge" under the TEHL, or otherwise refer to the TEHL, and (2) the affidavit did not recite the requisite demand for dismissal or reduction in salary. Initial Decision, p. 3. ***Thus, the Board, in 1987, had not been presented with a formal charge that conformed with the minimum requirements of the TEHL, that served the function of formally placing such charges before the Board or that gave the respondent, Gerald Grunwell, proper notice that charges were being pursued under the TEHL.

Despite these glaring deficiencies, the ALJ concludes, as a matter of law, that the February 13, 1987, affidavit should, nevertheless, be viewed as a formal written tenure charge because the petitioner's recitation of the facts in the February 13, 1987, affidavit was in "plain English," and "artful and moving." However, initiation of proceedings under the formal requirements of the TEHL require much more than a plainly drafted, artful and moving recitation of the facts. Therefore, this conclusion of law is erroneous.

With regard to the actual proceedings before the Board, the ALJ properly found that the Board, in 1987, "did not comply strictly" with the procedural requirements of the TEHL. Initial Decision, pp. 3 and 8. Specifically, the ALJ found that the Board took final action against Mr. Grunwell at a public meeting, contrary to the statutory proscription against consideration of, or local board action upon tenure charges at a public meeting, N.J.S.A. 18A:6-11.*** Moreover, the Board's consideration of this "charge" apparently consisted solely of a meeting with the [G.'s], and on a separate occasion, a meeting with Mr. Grunwell. Initial Decision, pp. 4 to 5. The record does not reflect that the Board

> disclosed or provided the [G.'s] or Mr. Grunwell with any opportunity to respond to any evidence or testimony that may have been presented to the Board during these meetings. The petitioner contends that the probable cause proceeding envisioned under the TEHL requires, at a minimum, a formal opportunity for all parties to respond, not merely the informal meetings conducted by the Board in this instance. In sum, the 1987 proceedings did not constitute formal proceedings under the TEHL sufficient to satisfy the requirements of the doctrine of res judicata. (emphasis in text) (Petitioner's Exceptions, at pp. 8-10)

Petitioner also excepts to the ALJ's application of the res judicata bar because the Board's March 1987 decision is not a final judgment on tenure charges. Rather, she avers that the record only reflects the Board's decision on a complaint from parents and other community members pursuant to its powers to administer minor discipline. As to this, petitioner concedes that the ALJ correctly determined that such decisions are reviewable by the Commissioner (Initial Decision, at p. 4) but urges that it does not follow that these minor disciplinary proceedings should preclude full and fair consideration of formal tenure charges under the TEHL.

Moreover, petitioner argues that even if the 1987 proceedings were under the TEHL, such proceedings are not, as a matter of law, final decisions entitled to preclusive effect. She contends that the factual truth of a tenure charge and actual penalty are determined by the Commissioner. The local board's role is limited to determining whether the supporting documentation provides probable cause to certify the charges to the Commissioner and whether the charge if true is sufficiently flagrant to warrant dismissal or reduction in salary. She argues that since res judicata applies only where there is a final judgment after full and fair litigation in a formal adversarial proceeding with procedural safeguards, City of Hackensack, supra, the Commissioner should find that as a matter of law, local board proceedings under the TEHL are not final determinations and do not necessarily preclude the consideration of subsequently filed tenure charges. (Petitioner's Exceptions, at pp. 11-12)

Petitioner also argues that the ALJ erred in applying the doctrine of res judicata because the doctrine requires that the record reflect substantial credible evidence supporting any factual findings made by the agency. City of Hackensack, supra It is petitioner's contention that the record in the instant matter does not contain the requisite substantial evidence to support the Board's findings that Grunwell used improper judgment but his record did not exhibit a pattern of prejudice or intolerance or any intent to harm or insult the student. Such conclusionary statements without more are insufficient for res judicata and the Board's failure to substantiate its "findings" is, according to petitioner, further evidence of the inadequacy of the 1987 proceedings under the TEHL.

Petitioner also argues that the record simply does not support the harsh and inequitable result of forever barring her from pursuing any charges under the TEHL. Of this she states:

> ***Given the record in this case, the ALJ was compelled to conclude, as he did, that "hurtful" statements were uttered by Mr. Grunwell, Initial Decision at p. 8, and that the "punishment" imposed by the Board, i.e., reprimand, was "mild compared to the hurt." Id. at 9. Nonetheless, even though dismissal of the petition "seems harsh indeed," he concludes that the public interest requires that Mr. Grunwell should not be "vexed twice for the same cause of action." id.
>
> The ALJ's conclusion is neither supported by the equitable balance underlying the res judicata doctrine or by the public interest. Indeed, the ALJ failed to adequately weigh the significant public interest in protecting young, impressionable school age children from the kind of behavior that convey racism. Such statements have no place in our educational system and require consideration in conformance with the specific requirements of the TEHL. However, in this instance, the [G.'s] never received full and fair consideration of charges in conformance with the TEHL. These considerations far exceed the Board's, and Mr. Grunwell's interest in putting this matter to rest particularly in view of the statutory requirement that all proceedings under the TEHL must be private. The petitioner deserves a full airing of charges under the TEHL, not the sweeping of racially derogatory remarks under a bureaucratic rug because an issue is "volatile" or because of a hope "that time will erode its power to cause additional harm." Initial Decision at p. 9. Racially derogatory conduct should be forthrightly and forcefully dealt with by local boards and the ostrich-like approach followed by the Board, and supported by the ALJ, is contrary to the public interest.
>
> Moreover, the equities dictate that the bar of res judicata should not be imposed. In this case, the petitioner was "frustrated in her attempt to appeal" the Board's March 26, 1987, reprimand decision. Initial Decision, p. 8. The petitioner reasonably relied upon the DOE's assessment that the 1987 proceedings were not under the TEHL. Since local board action is a necessary prerequisite to the Commissioner's jurisdiction over a tenured employee, the petitioner followed the DOE's advice and filed tenure charges in conformance with the Act.***
>
> (Petitioner's Exceptions, at pp. 15-16)

Lastly, petitioner avers that in the event that the March 1987 proceedings are accorded preclusive effect, she should still be afforded the opportunity to appeal that decision to the Commissioner as she was frustrated in her effort to exercise her right of appeal from the Board's determination through no fault of her own, i.e., the Department of Education's rejection of the timely filed Petition of Appeal and determination that her only recourse was to initiate local proceedings under the TEHL.

The Board urges that the factual findings made by the ALJ support his decision to bar the instant matter by the doctrine of res judicata. It states, inter alia, that:

> It is obvious from these factual findings that, notwithstanding the fact that petitioner's affidavit was not labeled a "tenure hearing charge", the Board considered it as such, undertook the required probable cause investigation and rendered a final decision not to certify charges. These findings, therefore, support the ALJ's determination that res judicata is applicable to the proceedings undertaken before the Board. This is particularly true in this case where the facts supporting petitioner's original charge and the second charge filed on behalf of petitioner by the Public Advocate are exactly the same.
>
> As Judge Holmes properly found, any defects in the procedure followed by the Board were for Mr. Grunwell to complain of and not the petitioner. The petitioner has no standing to assert any due process arguments of the teacher who has chosen not to assert them himself. In addition, as Judge Holmes notes, the legislative history of the tenure hearing law clearly establishes that the purpose of the law is to protect teachers. This purpose would be destroyed if Mr. Grunwell was forced to twice defend against the exact same charge. The doctrine of res judicata is designed to prevent such an occurrence and its application to this case is appropriate.
>
> (Board's Reply Exceptions, at p. 2)

Respondent Grunwell's reply exceptions contend that petitioner's exceptions do not set forth substantively any additional arguments which were not addressed by the ALJ. He relies upon his letter brief of August 31, 1989 setting forth his position which was considered by the ALJ and incorporated here by reference.

As to petitioner's request that she be allowed to appeal the Board's 1987 decision if the proceedings are accorded preclusive effect because she was frustrated in her attempt to do this through no fault of her own, Grunwell urges that to do so would permit petitioner to circumvent the doctrine of res judicata and it would force him to once again respond to the same charges. Moreover, Grunwell avers that the fact that petitioner failed to bring any requisite

action of appeal when the Department of Education refused her 1987 petition does not afford her the right to reopen the failed petition at this late date.

Upon a careful and independent review of the record in this case the Commissioner does not agree with the ALJ's conclusion that the matter is barred on the basis of the doctrine of res judicata for the following reasons. First, a thorough examination of the record demonstrated that proceedings under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq. (TEHL) and N.J.A.C. 6:24-5.1 were not only not strictly complied with as recognized by the ALJ but also that the tenure hearing statutes and regulations were never even invoked in 1987.

N.J.S.A. 18A:6-10 mandates that:

> No person shall be dismissed or reduced in compensation,
>
> (a) if he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system of the state***
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after a hearing held pursuant to this subarticle, by the commissioner, or a person appointed by him to act in his behalf, after a written charge or charges of the cause or causes of complaint, shall have been preferred against such person, signed by the person or persons making the same, who may or may not be a member or members of a board of education, and filed and proceeded upon as in this subarticle provided.
>
> Nothing in this section shall prevent the reduction of the number of any such persons holding such offices, positions or employments under the conditions and with the effect provided by law. (emphasis supplied)

N.J.S.A. 18A:6-11 further mandates that:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the

charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. The board of education shall forthwith notify the employee against whom the charge has been made of its determination, personally or by certified mail directed to his last known address. In the event the board finds that such probable cause exists and that the charge, if credited, is sufficient to warrant a dismissal or reduction of salary, then it shall forward such written charge to the commissioner for a hearing pursuant to N.J.S. 18A:6-16, together with a certificate of such determination.*** The consideration and actions of the board as to any charge shall not take place at a public meeting. (emphasis supplied)

N.J.A.C. 6:24-5.1(b) provides specifically that:

(b) In all instances of the filing and certification of tenure charges, other than for reasons of inefficiency, the following procedures and timelines shall be observed:

1. Charges shall be filed in writing with the secretary of the district board of education, accompanied by a supporting statement of evidence, both of which shall be executed under oath by the person or persons instituting such charges.

2. Charges along with the required sworn statement of evidence shall be transmitted to the affected tenured employee within three working days of the date they were filed with the secretary of the district board. Proof of mailing or hand delivery shall constitute proof of transmittal.

3. The affected tenured employee shall have an opportunity to submit to the district board of education a written statement of position and a written statement of evidence both of which shall be executed under oath with respect thereto within 15 days of receipt of the tenure charges.

4. Upon receipt of respondent's written statement of evidence under oath, or upon expiration of the allotted 15 day time period, the district board of education shall determine by a majority vote of its

> full membership within 45 days whether there is probable cause to credit the evidence in support of the charges and whether such charges, if credited, are sufficient to warrant a dismissal or reduction of salary. (See N.J.S.A. 18A:6-11.)
>
> ***
>
> 7. All deliberations and actions of the district board of education with respect to such charges shall take place at a closed meeting. (emphasis supplied)

The affidavit submitted by the parents in February 1987 reads precisely as follows:

> On February 3, 1987, our son William was in social studies class being taught by Mr. Gerald Grunwell. While discussing the America's Cup Race, Mr. Grunwell asked the students if anyone had been sailing. William raised his hand in order to answer the question. Mr. Grunwell looked at him and said, "William you're lying. Black people don't go sailing. The only Black people who even went sailing were the slaves." After the statement was made there was laughter in the classroom.

There is nothing within that affidavit to substantiate that L.G. was initiating formal tenure charges against Grunwell in accordance with statutory and regulatory requirements of the TEHL.

Even if such affidavit were in fact accorded that status, the record simply does not establish that the Board complied with the remaining procedural requirements of the TEHL, i.e. that the Secretary of the Board presented the affidavit to the Board as a formal filing of tenure charges and a sworn statement of evidence; that the Board provided a copy of the affidavit to Grunwell as a filing of tenure charges and a sworn statement of evidence; or that it noticed Grunwell that he had 15 days within which to submit a written statement of position and a written statement of evidence under oath.

While it is clear that the Board took seriously the complaint brought to its attention by petitioner and that it investigated it by meeting separately with petitioner and Grunwell, and that it acted on the complaint at a public session, the record is clear that the Board never met in private session to consider the alleged tenure charges as required by statute and code. In Cirangle, supra, the New Jersey Appellate Court made it quite clear that tenure charges may not be considered at public board meetings even if desired by the employee against whom the charges were filed. It determined that:

> Historically, the Tenure Employees Hearing Law never dealt with the issue of whether disciplinary matters should be heard in public or private. Clear and specific language prohibiting consideration and action at public meetings was inserted for the first time in the latest amendment promulgated shortly after adoption of the Open Public Meetings Law. Bearing in mind the legislative intent to remove hearings of this nature from local school boards because of the disruptive effect upon the community, it becomes apparent that the failure to specifically afford accused employees the right to demand a public hearing cannot be chalked up to legislative oversight. The Legislature has manifested its intention to exclude the public even in the face of a demand for an open meeting by the affected tenured employee. (at 602)

Moreover, even if the Commissioner agreed that the 1987 Board actions were found to be in essential compliance with the requirements of N.J.S.A. 18A:6-10 et seq. and N.J.A.C. 6:24-5.1(b), the doctrine of res judicata would not apply because the proceedings before a board of education with respect to tenure charges are not the type of formal adversarial proceedings necessary for the application of res judicata.

Further, as determined by the New Jersey Appellate Court in In re Fulcomer, 93 N.J. Super. 404 (1967) a board's authority with respect to tenure charges was specifically limited by the Legislature to that of preliminary review. Fulcomer reads in pertinent part:

> There is nothing in the new act which suggests the local boards were intended to retain any part of the jurisdiction which they formerly exercised in such controversies other than a preliminary review of the charge and the required certification to the Commissioner. Their participation in such proceedings is specifically confined to that limited function. Thus, the Legislature has transferred, from the local boards to the Commissioner, the duty of conducting the hearing and rendering a decision on the charge in the first instance. His jurisdiction in all such cases is no longer appellate but primary. (emphasis supplied) (at 412)

The Commissioner agrees with petitioner that, contrary to the ALJ's determination, public interest does not compel application of res judicata in this matter. Rather, as expressed previously by petitioner, the greater public interest is in protecting young impressionable school age children from the kind of behavior that conveys racial slurs.

Having determined that the instant matter is not barred on the basis of res judicata, the Commissioner nonetheless declines to order that the matter go forward for hearing on the merits of petitioner's claim because he does not find the record sufficiently developed to accept the ALJ's determination that the matter is not barred on the basis of laches. While the record demonstrates that petitioner did not "rest" in the matter through May 1987, the last documented contact with the Department of Education, there is no record established as to why some 19 months elapsed from May 1987 until the filing of the tenure charges on December 1988, particularly in light of the Board attorney's affidavit of June 15, 1989 which states that the Public Advocate's office had involvement in the matter in June 1987.

Therefore, the matter is remanded to the Office of Administrative Law for the sole and limited purpose of building a record as to why 19 months elapsed from May 1987 to petitioner's filing of tenure charges pursuant to N.J.S.A. 18A:6-11 and N.J.A.C. 6:24-5.1(b) and a determination by the ALJ as to whether such period of time constitutes an unreasonable delay which would provide the basis for estoppel by laches.

It is further directed that given the nature of the issues involved in this matter that the remand be dealt with on an expedited basis.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ANNUAL	:	
SCHOOL ELECTION HELD IN THE TOWN-	:	COMMISSIONER OF EDUCATION
SHIP OF OLD BRIDGE, MIDDLESEX	:	DECISION ON REMAND
COUNTY.	:	
	:	

For the Petitioner, Schwartz, Pisano, Simon, Edelstein & Ben Asher (Lawrence s. Schwartz, Esq., of Counsel)

For the Respondent Board, Wilentz, Goldman & Spitzer (Harold G. Smith, Esq., of Counsel)

This matter was remanded to the Commissioner by the State Board of Education for a determination as to "***when the board secretary, acting pursuant to N.J.S.A. 18A:14-61 announced the election results in this case***." (State Board Remand, at p. 4) The aforesaid determination was necessary to determine whether a request for an election inquiry pursuant to N.J.S.A. 18A:14-63.12 was timely filed.

Background

By way of a letter received by the Commissioner on April 14, 1989, Frank Cerra, a defeated candidate for a position as a board member of the Old Bridge Township Board of Education, requested an inquiry into alleged election law violations pursuant to N.J.S.A. 18A:14-63.12. The aforesaid statute requires that a request for said inquiry by a defeated candidate be made "***within 5 days of the announcement of the result of the election by any defeated candidate***."

On April 18, 1989 Mr. Cerra was advised by the Director of Controversies and Disputes that an inquiry would not be undertaken due to untimely filing. Upon appeal to the State Board of Education the matter was remanded to the Commissioner to render a final decision pursuant to his statutory authority to decide controversies and disputes.

By way of letter dated July 28, 1989 the Commissioner rendered a decision in response to the remand from the State Board of Education in which he reaffirmed the determination that the request for inquiry from Mr. Cerra was untimely. In so doing, the Commissioner cited N.J.S.A. 18A:14-59 which requires the judge of elections in each polling district to "***announce the result of the voting in the district publicly" and N.J.S.A. 18A:14-61 which requires the aforesaid district results to be immediately delivered to the secretary of the board who adds to the statements of the results of each district the canvass of the military service and civilian absentee ballots as certified by the county board of

elections and thereupon announces the results. Further in support of his determination, the Commissioner cited Richard Fontanella et al. v. W. Cary Edwards, Attorney General and Jane Burgio, Secretary of State et al., Superior Court, Appellate Division, A-6196-85T5 October 19, 1987 for the proposition that the announcement and actual knowledge of a party of the results of an election is sufficient to start the running of a statutory timeline.

> In remanding this matter the State Board held as follows:
>
> While we agree that the proper "announcement" of the election results contemplated by N.J.S.A. 18A:14-63.12 is the announcement of the combined vote in the district, including absentee ballots, which the board secretary is required to make pursuant to N.J.S.A. 18A:14-61, there is no indication in the record regarding when that announcement was, in fact, made in this case. N.J.S.A. 18A:14-61 requires the judge of the election at each polling district to deliver "immediately" to the board secretary that polling district's tally sheets, poll lists, ballots and statement of the result. It further requires that the board secretary "shall add to the statements the result of the canvass of the military service and civilian absentee ballots as certified to him by the county board of elections and shall thereupon canvass the entire vote in the school district and combine the reports from all polling places and announce the result of the election." The statute does not, however, prescribe when that announcement is to be made, nor, as noted, is there any indication in this matter concerning when that announcement actually occurred.
>
> Consequently, we cannot concur with the Commissioner's assumption that it necessarily occurs "upon the closing of the polls." In addition to the statements of result from the individual polling districts, the board secretary is required by N.J.S.A. 18A:14-61 to add in the results of the military and civilian absentee ballots as certified to him or her by the county board of elections. Indeed, N.J.S.A. 18A:14-62 gives the board secretary five days after the election to forward a statement of the canvass of the votes, the ballots, poll lists and tally sheets to the county superintendent, and we conclude that it would be inequitable for purposes of calculating the timeliness of a request under N.J.S.A. 18A:14-63.12 to assume without proof the time of the board secretary's announcement.***

> Thus, insofar as there is no indication in the record as to when the board secretary, acting pursuant to N.J.S.A. 18A:14-61, announced the election results in this case, we remand this matter to the Commissioner for a determination thereof and, in accordance with that finding, a decision regarding the timeliness of Mr. Cerra's request and the legal effect thereon under N.J.S.A. 18A:14-63.12. (emphasis in text)
>
> (State Board Remand, at pp. 3-4)

In response to the remand directed by the State Board, a conference call was conducted with counsel for both Petitioner Cerra, and the Old Bridge Township Board of Education. Although counsel for the Old Bridge Board indicated that his client no longer chose to take any position in respect to the matter on remand, it was agreed that the secretary of the Board of Education of the Township of Old Bridge would provide a sworn affidavit setting forth in detail his actions in regard to the announcement and reporting of the election results. On November 22, 1989 R. Gregory Quirk, Old Bridge Board Secretary/Business Administrator, filed a sworn affidavit, a verified copy of the A33 Regular/Combined Statement of Result of School Election with Absentee Ballot attached, and a copy of the letter of transmittal to the Middlesex County Superintendent of Schools the contents of which are incorporated herein by reference.

By letter dated November 30, 1989 counsel for Petitioner Cerra was provided with copies of the aforesaid materials filed by Dr. Quirk and invited to respond to same. In response to the aforesaid letter, petitioner filed a letter memorandum which argued as follows:

> Mr. Cerra does not take issue with the veracity of Dr. Quirk's affidavit, but rather, assuming the accuracy of same, wishes respectfully to submit that its contents are nonetheless unavailing. In reaching a determination in this matter, the Commissioner should construe the relevant statutes in their entirety. Specifically, Mr. Cerra submits that the clear intent of the legislature was to provide an announcement mechanism in which (1) an informal, tentative announcement of election results is made to the public following the close of each polling place, N.J.S.A. 18A:14-59; (2) the combined results tentatively reported to the public following the close of all polling places, N.J.S.A. 18A:14-61; (3) an official report of election results is forwarded to the county superintendent within five days following the election, N.J.S.A. 18A:14-62, and (4) the final announcement of results is presented at the board of education's required organization meeting which, for Type II districts such as Old Bridge,

must be held no sooner than on any day of the first week following the annual school election, N.J.S.A. 18A:10-3(b).

In the matter at hand, the first day on which the Board legally could have held its organization meeting was April 10, 1989. Since Mr. Cerra's letter complaint in this matter was filed with the Commissioner on April 14, 1989, it was timely filed, pursuant to N.J.S.A. 18A:14-63.12.

Additionally, Mr. Cerra calls to the Commissioner's attention the fact that the County Board of Elections is required to "certify" the results of absentee ballots to the board secretary. N.J.S.A. 18A:14-28; 14-61. According to Dr. Quirk's affidavit he "received...via telephone, [on April 4, 1989] the tally of the absentee ballot results from the office of the Middlesex County Board of Elections" (Affidavit at 1, para. 2). Mr. Cerra respectfully submits that a mere telephone conversation with someone from the County Board of Elections cannot constitute the statutorily required certification of results upon which the official announcement contemplated in N.J.S.A. 18A:63-22 can be predicated.

Furthermore, Dr. Quirk fails to specify when, in what form, the requisite certification was received from the County Board of Elections. Rather, he simply avers that the Combined Statement of Election Results (A-33) was delivered to the county superintendent on April 7, 1989 (Affidavit at 2, para. 4). Consequently, it is not evident that the Combined Statement was, in fact, predicated upon the requisite certification of the Board of Elections. Therefore, it is respectfully submitted that said Combined Statement was not in compliance with statute and could not be considered to be the official announcement required to trigger the five-day period of limitations on election complaints. N.J.S.A. 18A:14-63.12.

For all of the foregoing reasons, Mr. Cerra respectfully submits that the Commissioner must find that the Board has failed to provide sufficient evidence of compliance with the statutory requirements for official announcement of election results and, therefore, that the reports of results enumerated in Dr. Quirk's affidavit do not trigger the five-day period of limitations set forth in N.J.S.A. 18A:14-63.12.

Mr. Cerra's letter complaint of April 14, 1989, was therefore timely filed and must be honored. (Petitioner's Letter Memorandum, at pp. 1-3)

Commissioner's Decision

The Commissioner has carefully reviewed the decision of the State Board remanding this matter to his jurisdiction, as well as the documents filed by the Board Secretary/Business Administrator of the Old Bridge Township Board of Education and the letter memorandum submitted by petitioner. Based upon the aforesaid review, the Commissioner affirms his earlier determination that the letter of Mr. Cerra seeking an inquiry into the conduct of the annual school board election held on April 4, 1989 was untimely filed pursuant to the five-day time limit found in N.J.S.A. 18A:14-63.12. Crucial to this determination is the conclusion by the State Board in its remand "***that the 'announcement' contemplated by N.J.S.A. 18A:14-61 must be a communication of a public nature presenting the combined results from all polling districts and which includes absentee ballots." (State Board Remand, at p. 4)

Since it is undisputed that it is the public announcement of the results of the election which triggers the five-day period within which a defeated candidate must request an inquiry into the conduct of the election, the Commissioner has carefully reviewed all of the relevant statutes bearing upon this particular issue and has sought to reconcile them in a manner which is both consistent with their letter and spirit. In so doing, the Commissioner notes that the only public announcement of election results which took place occurred as indicated by Dr. Quirk on the night of the election when he received notification by telephone of the absentee ballot and combined such results with the results from each of the election districts and publicly displayed the results and totals on the chalkboard for interested members of the public and press. (See page 2 of Dr. Quirk's affidavit.) It is at such time also when the A33 Regular/Combined Statement of Result was completed for transmission to the county superintendent. (See attached true copy of the A33 attached to Dr. Quirk's affidavit.)

While petitioner is correct in his assertion that the written certification and confirmation of the absentee and military ballots does not occur until after the public announcement indicated in Dr. Quirk's affidavit, no public announcement of results takes place after receipt of the written confirmation which, along with the A33, the poll lists, the paper ballots, when applicable, and the tally sheets, is transmitted in a sealed package to the county superintendent who is charged with its preservation for one year. (See N.J.S.A. 18A:14-62.) It is to be noted that the aforesaid statute makes no provision for a public announcement.

In defense of the timelines of the request for inquiry, petitioner contends that since both N.J.S.A. 18A:14-28 and N.J.S.A. 18A:14-61 require certification of the results of absentee, military and civilian ballots, the conveying of the results by telephone as reported by Dr. Quirk does not satisfy that requirement and

therefore the announced results on the evening of April 4 could not be considered official. Further, petitioner contends that since Dr. Quirk's affidavit does not indicate in which form the certification was received from the County Board of Elections, it is not evident that the combined statement of result filed with the county superintendent on April 7, 1989 was in compliance with the statute and therefore "***could not be considered to be the official announcement required to trigger the five-day period of limitations on election complaints.***" (Petitioner's Letter Memorandum, at p. 2) Petitioner argues instead that the official announcement which triggers the five-day time frame for filing for an inquiry into election procedures as provided for in N.J.S.A. 18A:14-63.12 is presented at the board of education's required organization meeting, which for Type II districts could not have been held earlier than April 10, 1989.

In affirming his letter decision of July 28, 1989 and rejecting petitioner's contention of timeliness, the Commissioner has also reviewed Title 19 to whose provisions regarding certification of military and civilian absentee ballots one is referred by N.J.S.A. 18A:14-28. Based upon such review, the Commissioner notes that N.J.S.A. 19:57-31 provides as follows:

> 19:57-31. Canvass of absentee ballots
>
> On the day of each election each county board of elections shall open in the presence of the commissioner of registration or his assistant or assistants the inner envelopes in which the absentee ballots, returned to it, to be voted in such election, are contained, except those containing the ballots which the board or the County Court of the county has rejected, and shall remove from said inner envelopes the absentee ballots and shall then proceed to count and canvass the votes cast on such absentee ballots, but no absentee ballot shall be counted in any primary election for the general election if the ballot of the political party marked for voting thereon differs from the designation of the political party in the primary election of which such ballot is intended to be voted as marked on said envelope by the county board of elections. Immediately after the canvass is completed, the respective county boards of election shall certify the results of such canvass to the county clerk or the municipal or district clerk or other appropriate officer as the case may be showing the result of the canvass by municipality and ward, and the votes so counted and canvassed shall be counted in determining the result of said election. (emphasis supplied)

Of particular moment in regard to the matter considered herein is the absence of any guidance by way of statutory direction of precisely when or how the certification is to take place. Therefore, given the sense of immediacy contemplated by N.J.S.A. 19:57-31 and N.J.S.A. 18A:14-61 in causing election results to be quickly made public and the apparent desire of the Legislature to assure that election inquiries are promptly requested as indicated by the five-day time limit contained within N.J.S.A. 18A:14-63.12, petitioner's contention relative to N.J.S.A. 18A:10-5(b) constituting the triggering of when the public announcement takes place is deemed to be without merit. Not only would the adoption of such reasoning permit the time frame for such announcement to trigger the five-day time limit to be as late as April 21, 1989 (any day within the first or second week following the annual school election) but such statute governing annual organization makes no mention of a requirement to formally announced election results.*

In reaching his conclusion in this matter, the Commissioner must look to the intent of the Legislature both as to what constitutes the formal announcement of the election results and the purpose for establishing a strict time limit for requesting an election inquiry. Where, as in this case, the statutes speak to the announcement of the election results upon receipt of the certifying of the absentee ballots but no specific means or time frame are established for such certification nor do any subsequent statutes provide for the issuance of a public announcement of results, the Commissioner must look to the guidance provided by the Court in fathoming the legislative intent. In this regard, the Commissioner finds instruction in the following excerpt from the Supreme Court in Wright v. Vogt, 7 N.J.L. 1 (1951):

> ***The aim of judicial construction is to ascertain the sense in which the terms were employed by the legislative body. City Affairs Committee v. Board of Commissioners of Jersey City, 134 N.J.L. 180 (E.&A. 1946).
>
> It is the general rule that exceptions in a legislative enactment are to be strictly but reasonably construed. New Jersey State Board of Optometrists v. S.S. Kresge Co., 113 N.J.L. 287 (Sup. Ct. 1934), modified and affirmed, 115 N.J.L. 495 (E.&A. 1935). But this rule, like all canons of interpretation, yields to the intention revealed by the context. The inquiry in the final analysis is the true intention of the law; and, in the quest for the intention, the letter gives way to the obvious reason and spirit of the expression. It is the settled rule that the construction may be enlarged or restrained according to the evident sense of the lawgiver.

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* In fact, N.J.S.A. 18A:10-3b permits the organization meeting to even meet within three days later than the end of the second week if there is a lack of a quorum.

> The words used, even in an exception, may be expanded or limited to effectuate the manifest reason and obvious purpose of the law. The spirit of the legislative act will prevail over the literal sense of terms. Compare Finnegan v. State Board of Tax Appeals, 131 N.J.L. 276 (Sup. Ct. 1944). The intention is taken or presumed according to what is consonant to reason and good discretion. Lynch v. City of Long Branch, 111 N.J.L. 148 (Sup. Ct. 1933). The particular words are to be made responsive to the reason of the enactment. Where the reason of the regulation is general, though the provision is special, it has a general acceptation. Dwarris on Statutes, p. 45. That which is reasonably implied is as much a part of the ordinance as that which is expressed. Compare Pine v. Okzewski, 112 N.J.L. 420 (E.&A. 1934); Fedi v. Ryan, 118 N.J.L. 516 (Sup. Ct. 1937); Brandon v. Montclair, 124 N.J.L. 135 (Sup. Ct. 1940), affirmed 125 N.J.L. 367 (E.&A. 1940); Kobylarz v. Mercer, 130 N.J.L. 44 (E.&A. 1943). (emphasis supplied) (at 6)

The Commissioner finds further support in the admonition of the Supreme Court that "[w]here a literal rendering leads to a result not in accord with the essential purpose and design of the Act, the spirit of the law will control the letter." (New Jersey Builders, Owners and Managers Assn' v. Blair, 60 N.J. at 338, as cited in State v. Carter, 64 N.J. 382, 391 (1974)

Further, since the issue involved here is not when or how official certification of the absentee ballots takes place but when petitioner had effective knowledge of the election results sufficient to trigger his request for an inquiry, it is uncontroverted that a public announcement was made on the evening of April 4, 1989 upon close of the polls. (See Petitioner's Letter Memorandum, dated May 17, 1989, at p. 2.)

There is no question, whether the written certification of absentee ballots took place later or not, that petitioner had or should have had sufficient basis upon which to assert his right to an inquiry based upon the public announcement of results on the evening of April 4, 1989.

For the foregoing reasons, the Commissioner finds that the public announcement contemplated by the Legislature to trigger the five-day time limit within which to file a request for inquiry pursuant to N.J.S.A. 18A:14-63.12 was the public announcement of election results which occurred on April 4, 1989. Consequently, petitioner's request for inquiry filed with the Commissioner on April 14, 1989 was untimely.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

TRANSCRIPT
ORAL INITIAL DECISION
OAL DKT. NO. EDU 6946-88
AGENCY DKT. NO. 279-8/88

IN THE MATTER OF THE TENURE HEARING OF JOHN FARGO, SCHOOL DISTRICT OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY

Glenn T. Leonard, Esq., for petitioner

Stephen N. Dratch, Esq., for respondent
(Greenberg, Margolis, Ziegler, Schwartz, Dratch, Fishman, Franzblau & Falkin, attorneys)

Record Closed: November 8, 1989 Decided: November 9, 1989

BEFORE **ELINOR R. REINER**, ALJ:

This is a transcript of the administrative law judge's October 4, 1989 Oral Initial Decision, pursuant to N.J.A.C. 1:1-18.2.

END OF TRANSCRIPT

This oral decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

November 7, 1989
DATE

ELINOR R. REINER, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

NOV 15 1989
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

jp

STATE OF NEW JERSEY
OFFICE OF ADMINISTRATIVE LAW
DOCKET NO. EDU 696-88
AGENCY REF. NO. 279-8/88

IN THE MATTER OF THE TENURE HEARING OF JOHN FARGO SCHOOL, DISTRICT OF THE BOROUGH OF NORTH ARLINGTON, BERGEN COUNTY

INITIAL DECISION

October 4, 1989
Newark, New Jersey
Commencing at 3 p.m.

A P P E A R A N C E S:

MESSRS. GREENBERG, MARGOLIS, ZIEGLER, SCHWARTZ, DRATCH, FISHMAN, FRANZBLAU & FALKIN
BY: STEPHEN N. DRATCH, ESQ.
Attorneys for John Fargo

GLENN LEONARD, ESQ.
Attorney for Petitioner Board

TALIAH J. HAMEED
Certified Shorthand Reporter

Reporting Services Arranged Through:
ESSEX-UNION REPORTING SERVICE
Certified Shorthand Reporters
161 Eagle Rock Avenue
Roseland, New Jersey 07068
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COMPUTER - AIDED TRANSCRIPT

The next part of this is the Initial Decision in this case. I have indicated to counsel that I would agree to give the decision orally today. I know that everybody was waiting for the decision. I did not want to have them wait any longer for the decision. It's important that it be rendered. I indicated that I would have a transcript of this if the Board of Education agreed to pay for the transcript for the convenience of the Commissioner of Education for his review of this determination.

I want to state at the outset before I start the Initial Decision that all of the students' names must be initials. So if there is any confusion by the court reporter as to that, they must, in fact, be initials. I have attempted, in drafting portions of this, to use the initial. If I make a mistake at some point, I will ask that the record be confirmed so that we can only use initials. I don't want to hurt any of the students by their name, although that was done, of course, for the hearing.

The second part of this is I'm

going to ask the court reporter if there is any question about what I am saying or if I am going too fast, I'll ask the court reporter to please stop me because I want to make sure that the Commissioner has a record of exactly what was said. And the third part of this is that I reserve the right in reviewing the transcript to make any grammatical changes or any changes in dates, minor corrections in order to conform with what I had intended to say. So I reserve that right to look over the transcript and make any changes that really are necessary. I will not change in any manner the substance of the determination here.

This is In the Matter of the Tenure Hearing of John Fargo, School District of the Borough of North Arlington, Bergen County. I will put down as the record close date October 4, today's date. Beginning is the Procedural History.

PROCEDURAL HISTORY

On August 24, 1988, petitioner,

Board of Education of the Borough of North Arlington, certified charges of unbecoming conduct to the Commissioner of Education against respondent, John Fargo. On September 15, 1988, respondent filed a certification in opposition to the charges and on September 22, 1988, the Department of Education, Bureau of Controversies and Disputes, transmitted this dispute to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

There is a footnote at this point which reads as follows:

It is to be noted that on January 27, 1988, respondent Fargo was suspended from his tenured teaching position with the North Arlington Board of Education. Mr. Fargo filed a petition with the Commissioner of Education seeking his immediate reinstatement to his teaching position. The Commissioner referred the matter to the Office of Administrative Law, and on July 26, 1988, Judge Philip Cummis issued an initial decision dismissing the matter. On September 2, 1988, the Commissioner of Education affirmed the Board's

action to suspend petitioner with pay. Noting the fact that the order was consented to by counsel for the parties and that charges had been certified against John Fargo, the Commissioner dismissed the petition of appeal as being moot by virtue of the Board's certification of tenure charges on August 24, 1988.

That ends the footnote. Back into text.

After notice to all parties, a prehearing conference was held on November 21, 1988. At that time, the issues were defined as follows:

1. Did the alleged actions of respondent, John Fargo, constitute conduct unbecoming a teaching staff member or other just cause in violation of N.J.S.A. 18A:6-10?.

2. If the charges are found to be true, would such alleged conduct warrant a dismissal or reduction in salary or other action?

At the time of the prehearing, the evidentiary hearing was scheduled for January 30, 31, February 1, 2, 3, 7, 8 and 9, 1989 at the Office of Administrative Law. This matter was heard on those dates. As a result of a request for the production of pupil records of certain students who were witnesses in the action, the matter was concluded on April 14, 1989 when this issue could be resolved. As a result of the difficulty in receiving the requisite transcripts necessary for the submission of briefs, the briefing schedule was amended. The record closed on October 4, 1989 after the submission of the last hearing brief and the determination of petitioner's motion to delay the restoration of salary payments to John Fargo for the 1989 school year.

STATEMENT OF THE CASE

At issue is essentially whether respondent from September 1987 through January

26, 1988 engaged in certain sexually and emotionally abusive behavior with several male students on school grounds. Specifically, it is alleged that:

(a) in September 1987, John Fargo touched the genitals through the clothing of a male student, B.M., with his hand in class;

(b) between Thanksgiving and Christmas, 1987, John Fargo touched the genitals through the clothing of a male student, B.M., three times with the eraser end of a pencil;

(c) between September 1987 and January 26, 1988, John Fargo pinched the buttocks of a male student, B.M.;

(d) John Fargo between September 1987 and January 26, 1988 repeatedly touched and rubbed the thigh and groin area of a male student, B.M.;

(e) from September 1987 through January 26, 1988, John Fargo repeatedly touched and rubbed the leg and inner thigh of a male student, D.P., in his classroom;

(f) between September 1987 and January 26, 1988, John Fargo touched the penis

through the clothing of a male student, D.P., twice with the eraser end of a pencil;

(g) between September 1987 and January 26, 1988, John Fargo, in the classroom, attempted to grab with his hand the penis of a male student, D.P.;

(h) before Christmas 1987, John Fargo twice grabbed the buttocks of a male student, D.P., in a classroom causing D.P. to forcibly repel Fargo by throwing him to the ground;

(i) prior to Christmas 1987, a male student, D.P., was standing under a decorative ball-shaped Christmas ornament in class singing jingle bells. John Fargo attempted to grab the genital area of D.P. while speaking the words "jingle balls." D.P. had to repel the advances of John Fargo;

(j) between September 1987 and January 26, 1988, John Fargo, on several occasions, would make inappropriate and indecent remarks to a male student, D.P., in class, such as "Oh, you have a tight ass today."

(k) between September 1987 and

January 26, 1988, John Fargo consistently used improper, indecent, sexually provocative and profane language in class;

(l) on or about October or November 1987, John Fargo hit the buttocks of a male student, C.D., in class with his hand or a book;

(m) in December 1987, John Fargo approached a male student, J.B., in the school hallway and stated to him, "have fun with your mom last night screwing her," so upsetting J.B. as to cause him to push John Fargo against the locker;

(n) between September 1987 and January 26, 1988, John Fargo put his hand on the knee and thigh of a male student, J.B., requiring J.B. to push Fargo's hand away;

(o) between September 1987 and January 26, 1988, John Fargo approached a male student, J.B., and said to him, "did you screw your girl friend last night?"

(p) between September 1987 and January 26, 1988, John Fargo has engaged in an established sexually abusive practice of touching the knees, inner thighs, buttocks and

genital area of male students;

(q) between September 1987 and January 26, 1988, John Fargo has engaged in a pattern of the use of highly inappropriate, sexually provocative and profane language in classrooms in the presence of classified students;

(r) between September 1987 and January 26, 1988, John Fargo by and through his conduct and actions as referred to herein, and otherwise as established through statements made by students formerly in his classes, established an inappropriate atmosphere in his classroom, of fear, harassment, uneasiness and uncomfortableness to the detriment of all students, manifesting itself in the unwillingness and refusal of students to appear after class.

UNDISPUTED FACTS

In an effort to place this controversy in its proper perspective, this court notes that a number of facts are undisputed. They may be summarized as

follows:

1. John Fargo graduated from William Paterson in May 1975 with a bachelor of arts degree in special education and a minor in speech correction. He is certified as a teacher of the handicapped and as a speech correctionist.

2. Fargo is presently earning his masters degree in speech correction at William Paterson College.

3. Fargo is married and his wife is a college teacher. He has a five and one-half old son.

4. On or about March 1976 Fargo was employed by the Harrington Park Board of Education as a special education teacher, teaching a class of neurologically impaired elementary school students. He worked in Harrington Park until June 1977 when he was bumped from his position.

5. Fargo became employed in Rochelle Park as a supplemental teacher on or about January 1978 and served in this capacity and as a special education teacher until June

1979.

6. Fargo worked as a substitute at Bergen County Vocational School from September 1979 to December 1979.

7. Fargo applied for a position in North Arlington on or about November 20, 1979 and began his employment with petitioner on or about January 1989.

8. From January 1980 to June 1981, Fargo served as special education teacher at Wilson School, teaching students eight to twelve years old.

9. From September 1981 until 1983, Fargo worked at Jefferson School, an elementary school, as a special education teacher. He taught in a self-contained program and was evaluated by Grace Crane, special education supervisor.

10. From 1983 to June 1986, Fargo taught as a special education teacher at Roosevelt School. He served as the primary teacher for approximately ten students.

11. Fargo received tenure in North Arlington after three years and received all salary increments until January 1988.

12. Fargo's teaching evaluations, both formal and informal, are positive. (R-8 through R-22 in evidence.)

13. Beginning September 1986, Fargo was assigned to North Arlington High School. Petitioner exchanged him and the high school special education teacher. Petitioner reduced the period in the special education resource room in order to allow Fargo to deliver speech correction services one period a day.

14. Petitioner saw one student for speech correction services one or two times a week. He had five teaching periods in the resource room and one period of speech correction, in addition to a planning period and a lunch period.

15. Mr. Fargo is a resource room teacher at the high school. He teaches English, Math, and Social Studies.

16. Mr. Fargo teaches five classified students at a time, approximately 25 a day. The students he sees are primarily perceptionally impaired or neurologically impaired. They are mainstreamed but spend one

or two periods a day in the resource room.

17. Fargo had access to the child study team records and reviewed them.

18. During the school years 1986-87, and 1987-88, Fargo was in room 313 A sharing it with Mr. Tortora, the other resource teacher. The room was divided by a bookcase which ran the width of the room with a five foot gap on the sides and vertically up to two feet from the ceiling. Fargo was on one side and Tortora was on the other side of the bookcase. Fargo sometimes conducted a class at the same time that Mr. Tortora taught a class. Mr. Fargo heard Tortora talk to students.

19. During the school year 1987-88, Eileen Glowacki, a supplementary education teacher, was assigned to the resource room predominantly used by Mr. Fargo and Mr. Tortora. Apparently, she was assigned students by the Child Study Team and taught by herself on the side not being used by Fargo or Tortora. She usually taught on Tortora's side. For two other teaching periods, when Fargo and Tortora used the rooms, she used a

different room. Miss Glowacki did not observe Mr. Fargo teaching during the 1987-88 school year; nor did she observe what occurred in his classroom.

20. During Fargo's second year at the high school, no one assisted him in class.

21. For the applicable period at issue, Fargo's students included B.M., C.D., K.B., D.P., J.B., S.S., R.R., D.H., and E.R.

22. The students he had were in different grades, were of different ages, and were taught different subjects of instruction. This required specific and careful planning. Fargo's procedure was to alternate from student to student and give individual instruction at his desk. He called students individually to sit up at his desk and receive instruction.

23. Mr. Fargo issued a disciplinary referral for D.P. on December 3, 1987. He indicated in the referral that D.P. persisted in talking, joking and wandering to 313 B during class. He was told to stay with Mr. Ehrlich for the remainder of the period.

That's R-27 in evidence.

24. The psychological evaluation for J.B. dated April 30, 1987 indicates J.B. is classified E.D., following a long history of alcohol and drug abuse. Of import, the psychological evaluation indicated that personality testing indicated some anxiety relating to impulse control, which at times placed J.B. under tension, particularly in a new situation. However, the psychologist believed that for his age and the difficulties he managed to resolve, he has made remarkable progress and adequate adjustment. The report noted his intellectual classification as bright average range.- R-28 in evidence.

25. The psychological evaluation for B.M. dated March 13, 1987 indicated that he is of average intelligence. The reason for referral was poor academic progress. The report noted that B.M. has a very positive and cooperative attitude toward both school and his teachers. It noted that B.M.'s most significant difficulties lie in the emotional area and these intrude into the perceptual and cognitive aspects of his personality.

Projective testing ran two themes, a relatively strong dependence need and difficulty in handling his anger as aggressive impulses. The report noted that B.M. has difficulty being present to what is actually going on, which may account for his poor performance at school and inability to sustain attention. B.M.'s poor self-image and feelings of inadequacy have been exacerbated by his long struggle with school and need for approval. Learning difficulties, coupled with consistent school failure have produced a poor self-image and feelings of inadequacy in B.M. He has a strong dislike for school. Emotional components also continue to play an important part in B.M.'s motivation. B.M.'s inability to keep up with his peers and classes, his low frustration tolerance, all contribute to a very angry, alienated young man who tries to put up a good front but who has not developed adequate and positive coping skills in time of stress. Academic support is highly recommended to address learning difficulties, but of equal importance is personal counseling to address the anger and poor impulse control

that is getting in the way of positive adjustment. (R-30 in evidence.)

26. The psychological evaluation for D.P. dated May 19, 1987 indicates he is of average intelligence. He was referred for poor academic functioning and reported inappropriate behavior at times. Strength in the verbal area were in subtests which measure the ability to conceptualize ideas and to demonstrate the ability to make appropriate moral judgments. Weakness appeared in the subtest which measured the ability to retain information required and the ability to apply basic processes of arithmetic to word problems. Strengths in the performance area were in tests which measured the ability to discriminate essential from non-essential details and good rote memory. Other performance tasks indicated poor visual perception, organization and coordination. The test results pointed toward a learning disability and the processing of information in language and math. Personality testing portrayed the profile of a young adolescent in conflict, and who was highly anxious regarding

his control of hostile emotions. D.P. perceives the environment as threatening and harmful to him and strives to maintain ego control in spite of contrary impulses. These feelings interfere with concentration and also tend to direct him in relieving stress by inappropriate laughter and moving about to ease tension. (R-32 in evidence.) The report of social and adaptive behavior assessment for D.P., dated May 29, 1987, reveals that in terms of social functioning D.P. is concerned about his grades, but seems even more concerned about social and emotional issues. He mentions concerns with peers. D.P. says he is teased a lot. He does not know how to deal with friends and it worries him. D.P. has a strong sense of right and wrong and feels internal pressure when he senses he is doing something wrong. At the same time, D.P. is a follower who wants to be liked and has a hard time saying "no." D.P. indicates he feels internal pressure and is concerned about losing control. He says he has a longstanding problem of laughing at inappropriate times. D.P. is also concerned that he will physically

hurt someone, especially his mother. (R-34.)

27. It became clear at the hearing that Mr. Fargo enjoyed a reputation as being a good teacher.

A. Claire Green, employed by petitioner for 14 or 15 years and an elementary school principal at Washington School for one year testified that she served as principal at Washington and Roosevelt Schools for 14 years. She noted that Fargo was a teacher of a special class for the neurologically impaired at Roosevelt for the school years 1984-85 and 1985-86. Having observed Fargo in a classroom setting (she conducted one formal observation and casual observations), she formulated the opinion that he was efficient, well organized and an effective teacher. Green, who knew Fargo casually and not outside school, opined that he enjoyed that reputation in the school.

B. Similarly, Katherine Killeen, employed by petitioner as a school psychologist for nine years at the high school and a member of the Child Study Team as a psychologist, indicated that she knows Fargo

based on his work in the elementary school with neurologically impaired students. Noting that she had contact with Fargo on a special project with resource students when he first arrived, she explained that Fargo was instrumental in making the project work. She stated that she did not have daily contact with him after the 1986-87 school year, but did have contact with him regarding certain students. She opined that Fargo is an excellent, methodical, conscientious teacher. If he had any doubts that the child was capable of work, he sought advice. The report from Roosevelt was that he was a teacher of the neurologically impaired and did a good job with the students.

C. Fargo was observed by Superintendent Blanco to be effective.

D. Eileen Glowacki, employed by petitioner from September 1985 to September 1987, worked with Fargo as a teacher's aid from September 1985 to June 1986 in Fargo's neurologically impaired class, teaching a group of students reading and english. She indicated that Fargo was an excellent teacher,

dedicated and giving. If a student was in trouble, Fargo "went above and beyond." She indicated everything he did was always for the students benefit. His lesson plans were impeccable. He checked to see that the assigned work was completed.

E. Veronica Veronica Madigan, a learning disability consultant, has known Mr. Fargo for ten years. She was impressed with his teaching skills. She opined that he is helpful. His input was excellent because he cared.

F. Mr. Anthony Tortora opined that Mr. Fargo was well organized and conscientious.

28. On January 14, 1988, B.M., a student in Mr. Fargo's classroom was issued a disciplinary referral by John Fargo. The referral stated that B.M. "insisted on joking around and laughing during class instruction. He also spent a good deal of class time complaining about some old assignments in today's lesson. Halfway through the period he was asked to leave the room. Just before he

left, he stated 'I'm going to get you in trouble.'" (P-1 in evidence.)

29. On January 14, 1988, B.M. went to see Charles Ehrlich, employed by petitioner for 19 years and supervisor of special needs for the last one and one-half years, with the disciplinary referral from John Fargo.

30. B.M. made certain allegations to Charles Ehrlich as to Mr. Fargo's improperly touching him. It is the basis of these allegations which caused an investigation into touching by John Fargo and which forms the basis of the tenure charges here.

31. DYFS, Division of Youth and Family Services, did an investigation into Mr. Fargo's action in conjunction with the Bergen County Prosecutor's Office.

32. Alyson Blake, an investigator for DYFS, was present when J.B., D.P., B.M., S.S., K.B., R.R., D.H., and C.D. were interviewed. Also interviewed were Mr. Tortora, Miss Madigan, Mr. Ehrlich and Mr. Ferguson.

33. DYFS issued a confidential report on May 20, 1988 prepared by Alison Blake.

34. On March 9, 1988 Blake and Leonard Barazaitis communicated to superintendent Blanco, received by him on March 10, 1988, that an investigation had been conducted and that the authors of the letter felt respondent's presence in the classroom could produce an element of risk to the children. It was recommended that if Fargo must be reinstated, he be reinstated to an administrative position, precluding him from contact with the student body.

35. Blake communicated to superintendent Blanco on January 25, 1988 that when DYFS was investigating, the school board should not do its own investigation at the same time.

TESTIMONY

The hearing centered on testimony presented by the Board in support of the charges and John Fargo's defense to them.

I. THE TOUCHING OF B.M.

B.M. was 18 years old at the time of the hearing. He no longer attends school. He stated that he had Mr. Fargo in September 1987 for English while he was in the ninth grade; he had no complaints about him. When he was in tenth grade, Mr. Fargo taught him English during the seventh period at 12:35, five days a week, in room 313. There were four other students in the classroom. B.M. indicated that he had problems dealing with Mr. Fargo. Fargo called students up to the desk to work with him. He required them to sit alone with him and moved his hand up the students' leg. More particularly, B.M. indicated that at the end of November and prior to Christmas, Mr. Fargo asked him to come up to his desk to work. He moved his

chair next to Fargo's, on the same side of desk as Mr. Fargo's, and their legs were touching. B.M. recalled that Mr. Fargo touched his penis through his clothing. B.M. stated that he grabbed Mr. Fargo's arm, shoved his hand away and went back to his desk. He further recalled that Mr. Fargo took a pencil and jabbed it on his penis with the eraser side. Mr. Fargo poked him with the pencil, and their legs were touching. He stated that Mr. Fargo poked him with the eraser on one occasion three times. B.M. pushed him away but said nothing; Mr. Fargo said he was kidding. B.M. indicated that Mr. Fargo poked him one time on another occasion when he was sitting next to him at his desk. He stated that he pushed him but could not recall if he said anything. Mr. Fargo said that he was kidding.

In further testimony, B.M. indicated that Mr. Fargo cursed in class and used such words as "come" in a sexual manner. Mr. Fargo had put his hand on B.M.'s shoulders and pinched his butt. More particularly, B.M. indicated that when he was with his girl

friend at his locker and bending over to get his books, Fargo grabbed his butt. Since he did not want a scene, he said nothing. Mr. Fargo also said nothing. B.M. indicated that he told no one about Fargo touching his butt.

Referring to P-1 in evidence, B.M. stated that when Mr. Fargo indicated that he would refer him, he said go ahead and walked out of the room. He did not believe Fargo would send the referral because he only threatened to make referrals but did not issue them. Since September 1987, B.M. received no other referrals. He admitted, however, that January 14 was not the first time that he had acted out in class. He recalled that Mr. Fargo had told him to stay after school for acting out in class. He did not show up, and Mr. Fargo simply added days on to the discipline. He admitted that he did not like having received the referral, although it was justified, and he wanted to get even. Thus, he told Ehrlich about the incidents. B.M. further admitted that he believed he should not be in Fargo's class and wanted to get out of it. Thus, he went to Mr. Ehrlich and told

him about the pencil, Mr. Fargo's hands all over him, and the fact that Fargo cursed. B.M. testified that he spoke to no one after the meeting of January 15, 1988. He recalled that he told Mr. Tortora about Mr. Fargo touching him and poking him in Ms. Glowacki's and D.H.'s presence prior to the time he reported the incident. Mr. Tortora advised him that Mr. Fargo would not do that. (D.H. was present for two minutes of the conversation). In further testimony, B.M. indicated that the incident made him nervous. He went to Sister Monica for counseling at Queen of Peace Church and told her what had happened.

On cross-examination B.M. recalled that after Thanksgiving, both he and Mr. Fargo were on one side of the desk and that he sat closest to the window. Mr. Fargo first touched his left thigh. He ran his hand up his leg, and it remained on his penis. B.M. shoved his hand away once. He recalled that Mr. Fargo said he was kidding. He believed that he told his mother that night and that it was discussed at dinner with his father. B.M.

said that he did not want his parents to call the school. He believed that the jabbing incident occurred at the end of November and December 1987, probably one or two weeks after the first incident. Mr. Fargo hit his penis with a pencil, jabbing it three times. B.M. revealed that it occurred so quickly that he could not stop the jab. He recalled that he spoke to his mother about it that evening. When she indicated she would call the school, he told her that he could take care of it himself. B.M. did not know whether or not she called the school.

B.M. recalled that the next day Mr. Ehrlich told Mr. Ferguson what B.M. had told him the day before; that is, about Mr. Fargo grabbing his thigh and moving it to the penis and jabbing his penis with a pencil. When Mr. Ferguson asked B.M. if this was right, B.M. said "yes." Mr. Ferguson asked him if this was blackmail of a teacher. Noting that Mr. Roden and Mr. Kinlock arrived, B.M. indicated that he informed all of them of the incidents and that he had told Mr. Tortora and Ms. Glowacki of the incidents. Similarly,

when he went to the prosecutor's office, he indicated that he had told Mr. Tortora and Ms. Glowacki.

He further indicated that he told D.P., who was his best friend at the time of the incidents. Although he could not remember when he told him, he stated that he told D.P. after he had told the administration and after Mr. Ferguson told him to keep it confidential. Although B.M. first indicated that he told D.P. that Fargo touched him in "certain spots," he later stated that he told D.P. that Fargo touched his "dick." He could not recall that he told D.P. that Mr. Fargo touched his "balls" but admitted that Mr. Fargo did not touch his balls and that he would not have told D.P. a lie. In further testimony, he admitted that he could have told D.P. of the incidents before he went to Mr. Ferguson, or both before and after he told Ferguson. He also stated that he told his girlfriend and could have told J.B. Questioned as to his employment with Jarvis Oil company, he indicated that he and D.P. were terminated after Jarvis complained that

money was missing, after he worked there for three months. On redirect examination, he indicated that he was fired from Jarvis because D.P. blasted the radio and "screwed up a lot on pumping gas."

Next to testify was Mary M., B.M.'s mother, who confirmed B.M.'s testimony. Noting that she knows John Fargo, she testified that from September 1987 to January 1988, B.M. complained. On one occasion, he complained about being required by Fargo to sit close to him. Noting that B.M. does not like bad breath or someone smelling funny, she recalled that he contended that Fargo did not smell good. B.M. also complained that Mr. Fargo put his hand on his leg and went up his inner thigh. Mary M. could not recall when B.M. told her this. On another occasion, B.M. told her that Mr. Fargo went all the way up his inner leg, and B.M. pointed to his genital area. He said Fargo poked him with a pencil. When she asked where, he said "a certain spot" and pointed to his genital area.

After B.M. complained about being

touched, Mary M. called Ms. Madigan and asked Madigan to take B.M. out of Fargo's class. She told Madigan B.M. was not getting along with Mr. Fargo and was not learning, but did not say why. Mrs. M. wanted him out of the class but did not want to hurt anyone. Madigan asked her to give it some time. She admitted she did not call Fargo, the principal or Mr. Ferguson.

She did recall being contacted by Mr. Ferguson and asked if B.M. had complained about Fargo. She told Ferguson that B.M. complained about the "leg" and "pencil." Ferguson asked her why she had not brought it to his attention.

She further recalled that B.M. said Fargo was not a good teacher and used curse words that a teacher should not use. She recalled that when B.M. started complaining, she took him to Sister Monica, a family counselor at Queen of Peace. She believed B.M. told Sister Monica about Mr. Fargo and continued to see her once a week for a few months.

On cross-examination, she could

not recall the dates of B.M.'s complaints. She did not recall how many times B.M. complained about being too close to Fargo and could not recall if B.M. told her at different times about each incident. She stated that B.M. told her that Mr. Fargo moved his hand up his inner thigh and touched a certain spot. On further questioning, she stated that B.M.'s friends from September 1987 to January 1988 included B.M., C. and D.P. B.M. was not too friendly with J.B. She admitted that her husband knew of the sexual incidents. He stated that if the teacher required B.M. to sit too close or "continued," he would see him. She further revealed that B.M. told her that he had talked to Mr. Tortora about this.

Further support, both directly and indirectly, for B.M.'s allegations was offered by students D.P., S.S., K.B. and R.R. D.P. recalled that he had had a discussion with B.M. about Mr. Fargo. He recalled that B.M. described the pencil incident in the same manner as D.P. described Mr. Fargo touching him. He recalled that B.M. told D.P. that he had had an incident with Fargo and that Fargo

jabbed him with a pencil. B.M. punched Fargo in the chest and Fargo, seated at the desk, moved backwards and hit his head on the radiator. Fargo wrote out a referral (D.P. thought because B.M. punched him.) B.M. told Madigan who got all of the students together. D.P. recalled that he saw B.M. in school and that B.M. was "pissed off." Questioned about his deposition, he admitted saying that B.M. told him that Fargo "grabbed his balls." He was not sure whether B.M. told him about "his balls" or that he had been "jabbed with a pencil."

On cross-examination, D.P. admitted that he has known B.M. since sixth grade and that he was his best friend. He acknowledged that they were "kind of fired" from Jarvis Oil because of their relationship with customers and "missing money." He alleged that he and his friends did not discuss Fargo, but he had heard he was a "fag." In further testimony, he stated that he does not "hang out" with B.M. anymore. Since October 1988, his best friend has been J.B., whom he has known since eighth grade.

Next to testify was S.S., a graduate of North Arlington High School in June 1988. He is presently 19 years old and employed as a clerk. Classified by the Child Study Team in eleventh grade, he testified that in September 1987, while in the twelfth grade, he had Mr. Fargo as a teacher for the first time. Fargo taught S.S. English lab, seventh period, 12:30 to 1:15 every day. B.M., K.B., R.R. and D.H. were in S.S.'s class. He noted that although he knew B.M. for about a year and one-half and played basketball with him, they did not "hang out" together. B.M. hung out with D.H. and J.B. He had not known the other students in his class before. From September 1987 to January 1988, he observed Mr. Fargo, while sitting at his desk, hit B.M. when he was at Fargo's desk, with the eraser part of the pencil on his penis. He saw this happen once in December and again after Christmas vacation in January. He recalled that B.M. got angry. On the second occasion, Fargo and B.M. got into a pushing match. B.M. started shoving Fargo and pushed him into a wall. (He did not believe

B.M. hit him in the chest or Fargo hit the radiator). Mr. Fargo hit B.M. back. Fargo left the class, apparently to get Ms. Glowacki to watch the class. Fargo returned and sent B.M. down to Mr. Ferguson's office. S.S. did not hear B.M. say, "I'm going to get you in trouble." He recalled that B.M. did not like Mr. Fargo's class and believed the work was silly. He did not discuss the incident with Fargo, B.M. or anyone in school. He later told the prosecutor.

Next to testify in regard to B.M. was K.B., who was 16 years old and in the tenth grade. Classified, NI, he had Mr. Fargo as a teacher in grades five through nine. In the ninth grade, from September 1987 to 1988, Mr. Fargo taught him English, seventh period, five days a week. His classmates were D.H., B.M. and S.S. He stated that he saw Mr. Fargo touch B.M. Fargo put his hand on B.M.'s knee on more than one occasion. He did not see Fargo attempt to grab B.M.'s penis or his genitals. He saw Fargo touch B.M.'s left kneecap but not move up his leg. Noting that B.M. was sitting at Mr. Fargo's desk next to

him at the time, he recalled that B.M. said "get off." Sometimes, B.M. moved his chair away from Fargo. He stated that he did not see Fargo touch anyone other than B.M. He recalled that on one occasion, B.M. was sent out of the room because he got in trouble. He could not recall anything else. Noting the fight was verbal not physical, he heard B.M. say, "I'm going to get you in trouble." He noted that B.M. did not like the work and did it only after Fargo yelled at him. He noted that his closest friend in the class, perhaps his best friend, is R.R. The other students in the class were older and in higher grades. He did not "hang out" with B.M. or D.H.

Next to testify was R.R., classified PI and considered by Fargo to be a middle-of-the-road student. R.R. observed fights between Fargo and B.M. which concerned B.M. not doing his work. He opined that they did not like each other. He heard B.M. complain that Fargo touched him. He did not know how many times B.M. complained but did not see B.M. or other students being touched. He noted that B.M. is not a good friend of

his. K.B. is his best friend. He believed that B.M. sat with S.S. and they were "sort of friendly."

Additional input was offered by D.H. At the time of the hearing, she was 16 years old and in the eleventh grade. She had Mr. Fargo as a teacher in tenth grade from 1987 to 1988, for seventh period English. She stated that Mr. Fargo never touched her, put his arm around her, or made her sit next to him so that their legs touched. Her chair did not touch his, and he did not put his hand on hers. She said that Fargo pulled the chair closer for everyone so that they could see the books. She recalled that Fargo and B.M., who was in her class, had a couple of arguments (she did not recall the reason for them), and that Fargo sometimes cracked jokes. She observed Fargo pat B.M. on the back. Noting that her desk was one foot away from Mr. Fargo's, she indicated that on one occasion, she saw Fargo pat B.M. on the knee. B.M. pushed him away. D.H. could not recall if anything was said but recalled that Fargo kidded around and "raised his eyebrows to

B.M." She noted that she did not really pay attention. She did her work. She recalled that on one occasion, she was talking to Ms. Glowacki and Mr. Tortora. She said that Mr. Fargo "may be a little funny" and B.M. said that "he is a homosexual." She believed that she said this because of the rumors that were going around and giving her these ideas. She did not hear B.M. tell Tortora he was touched improperly. She was not asked by Fargo to stay after school because she was a good student and her attendance was good. She believed Fargo was a good teacher. D.H. recalled B.M. complaining about the work once or twice and being present when B.M. was sent for a disciplinary referral. She stated that he "acted like an idiot" but did not slug Mr. Fargo. Noting that she disliked the students in her class, she indicated that she did not always get along with B.M. and had not been good friends with him until the past year. B.M. hung out with D.P. and J.B., but not S.S.

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In support of B.M.'s testimony, petitioner called certain administrators to

the stand to testify as to B.M.'s allegations.

Mr. Ehrlich, who has known B.M. for six years, indicated that he was teaching a class when B.M. came into his class on January 14, 1988 and sat down. Although he noted that there was no emotional immediacy that required him to stop what he was doing to attend to B.M., describing B.M.'s demeanor, he indicated that B.M., although not crying, seemed visibly upset. He was flushed; his color was red. He jumped around. He could not sit, and his hands were swinging. He sat with his head down on his chest for half an hour. He moved but did not talk. At approximately two o'clock, Ehrlich had an opportunity to ask B.M. what happened and was advised by B.M. that there was a problem in class. B.M. admitted he had not been sitting still, had been acting out and not following the rules of the classroom. Ehrlich told B.M. to see him the morning of January 15, 1988. On the morning of January 15, 1988, B.M. came to see him. Although he seemed calmer, he did not look Ehrlich in the eye while he was

talking. Ehrlich recalled that B.M. held out P-1 in evidence. Ehrlich asked B.M. why he had acted out, and B.M. said that something had happened. B.M. advised that he was sitting next to John Fargo in the resource room. Mr. Fargo put his hand inside of B.M.'s thigh, moved his hand up and touch B.M.'s private parts. Ehrlich testified that he did not draw a conclusion as to the chronology of the events; he did not believe B.M. acted out because Fargo had touched him. Ehrlich testified that he did not ask B.M. when the incident occurred nor did B.M. mention how many times it had occurred. Ehrlich immediately took B.M. to see the director of special guidance, William Ferguson. Ehrlich testified that B.M. told Ferguson the same story he had told him. Ferguson asked B.M. if he was sure and B.M. agreed. Mr. Ferguson contacted Mr. Roden, principal of the high school, Ehrlich's immediate supervisor, and B.M. made the same statement to him. He further recalled that Mrs. M., B.M.'s mother, was contacted by Mr. Ferguson. He recalled Ferguson repeating the statement to B.M.'s

mother. He noted that Mr. Ferguson said, "are you sure you knew about this? Why did you not say this in December?" He recalled Mr. Ferguson saying to Mrs. M., "are you sure you heard this happen? Touch B.M. with a pencil?" He also recalled Ferguson asking B.M. if Mr. Fargo had touched him with the eraser. Ehrlich further revealed that assistant principal Kinlock was called in and informed as to what occurred. Roden directed Mr. Kinlock to contact the Division of Youth and Family Services.

Next to testify as to the sequence of events on January 15, 1988 was William Ferguson, employed by petitioner for 25 years and director of guidance for the last ten years. Ferguson is the guidance counselor for the ninth grade to twelfth grade resource room students. Ferguson testified that on January 15, 1988, Ehrlich came to him and said "I want to see you now." Ferguson read the disciplinary referral and asked what was meant by "I'm going to get you in trouble." Ferguson said that this sounded like blackmail. Ferguson recalled that B.M. seemed

nervous and put his head down. B.M. said that Fargo had touched him; while he sat next to Fargo, Fargo put his hand on his leg and moved his hand up his thigh. Ferguson recalled that he asked B.M. what he did in response, and B.M. said that he took Fargo's hand off of his leg and put it on the desk. When Ferguson asked B.M. if B.M. wanted to change his story, B.M. said, "no, I'm telling the truth." Ferguson noted, that in a raised voice, he asked B.M. if he was telling the truth. B.M. said he would lie if he wanted him to but that he was telling the truth. At that point, B.M. did not mention "private parts."

When Roden appeared in the office, Ferguson asked B.M. if he wanted to change his story prior to repeating it to Roden. B.M. indicated that he was telling the truth and repeated the story. Noting that Kinlock then came into the office, Ferguson recalled that he telephoned B.M.'s mother and informed her that there was a real problem. He repeated the story to Mrs. M. Ferguson recalled that he was shocked when Mrs. M. said B.M. had told her about this. She informed Ferguson that

she had known about this in December and asked whether B.M. had also told him that Fargo had touched him on the penis with a pencil. Ferguson was annoyed that Mrs. M. had not mentioned this to him before. He told Mrs. M. that he would contact DYFS. Ferguson then asked B.M. about the pencil, and B.M. said it was true. Ferguson asked B.M. why he had not told him about this before, and B.M. said that he did not want to get Mr. Fargo into trouble. Roden said the story should remain in the office; there was no further discussion with anybody. Ferguson told B.M. that it was confidential.

Ferguson further revealed that he spoke to Mrs. Madigan, the learning disabilities teacher, apparently to move B.M. out of the resource room. He noted that B.M. had told Mrs. Madigan what happened, and Madigan related to him what B.M. had said.

On cross-examination, questioned specifically as to what B.M. told him, Ferguson stated that he thought B.M. said that Fargo touched him in a manner he did not like and used the words "grab me." B.M. said that

Fargo put his hand on his leg and moved his hand toward his private parts. B.M. did not say that Fargo touched his private parts. He further revealed that when he spoke to B.M.'s mother on the telephone, she mentioned that Fargo took an eraser and touched B.'s penis. Ferguson admitted that B.M. had complained about the resource room, believing it was "baby shit." He did not like Fargo or the work at the resource room at times.

In further testimony Ferguson stated that B.M. never told him that he told Mr. Tortora or Ms. Glowacki about the incident between Fargo and himself. B.M. also did not tell him about Fargo slapping him on the buttocks. Questioned as to his statement in which he revealed that B.M. told him about Fargo putting an eraser on his penis and that he called B.M.'s mother about this, he stated that he now thinks that B.M.'s mother told him first about the pencil and was "not sure who told him first." He admitted that he told the prosecutor investigating this matter that B.M. can be sneaky but stated that he would not say that he was sneaky.

Next to testify was David Roden, principal of the high school for the last six years. He attended the meeting on January 15, 1988. He recalled that Ferguson told B.M. to tell him what he had told him. B.M. said that Fargo had his hands on his thigh and moved it up to his private parts. Roden indicated that this was serious and to repeat it. B.M. did so.

Roden heard Ferguson speaking on the telephone to Mrs. M. and heard Ferguson say, with emphasis for Roden, "you knew about this in December." He recalled Ferguson asking why he was not advised sooner and repeated that, "Fargo touched B.M.'s penis with the eraser side of the pencil." Roden advised B.M. not to talk about this and not to report to class. Kinlock was directed to report the situation to DYFS, who was responsible for the investigation. In fact, Roden indicated that he had advised teaching staff members aware of such a situation to inform DYFS.

On cross-examination, Roden admitted that B.M. was sure that he had told

Tortora what Fargo did. Although Roden knew this, he did not confront Tortora and had no knowledge as to why action had not been taken against Tortora.

Anthony Blanco, employed by the board for 35 years, and superintendent for the last six years, testified that Roden, Kinlock and Ferguson came to his office after one o'clock on January 15, 1988. Roden told him about the events leading to them being there. Kinlock contacted the Division of Youth and Family Services, and the prosecutor's office was contacted by DYFS.

On or about January 20, Blanco received a call from Alyson Blake, Institutional Abuse Unit, DYFS. He was instructed not to conduct an investigation. On January 25, 1988 Blake contacted Blanco and recommended that Fargo be removed from the classroom. Blanco communicated Blake's statement to the president of the board, and the recommendation was to suspend Fargo with pay. Blanco presented the document to Fargo. Fargo said, "I guess you know what happened." Blanco said that he felt badly about the

allegation. Fargo said, "I knew that this would happen if I went to the high school."

After January 27, Blanco received the DYFS report. Upon receiving the reports from the prosecutor's office and DYFS, he met with counsel for the board, Mr. Leonard, and the students. Nine students were contacted and five appeared in his office. Mr. Leonard asked the students questions. Since the statements were consistent with the reports, Blanco recommended that the board certify charges. The board did so, and Blanco conducted no further investigations regarding this matter.

On cross-examination, Blanco indicated he first became aware that in early June 1988 that B.M. alleged he had informed Tortora he had been touched by Mr. Fargo. He acknowledged that if B.M. was correct, Tortora should have informed DYFS or the school; it is not a judgment call. Blanco contacted Tortora about B.M.'s statement and Tortora denied it. No action has been taken against Tortora or Ms. Glowacki based on B.M.'s statement.

Next to testify was Veronica

Madigan, employed by petitioner as a learning disability consultant for four years. She has a masters in learning disabilities and is a member of the child study team. She indicated that when B.M. transferred to the school, his academic problems became apparent, and Fargo requested an educational work-up. Madigan believed that he would benefit from a full evaluation. She indicated that Fargo had told her about the disciplinary referral (P-1) regarding B.M. Since she was B.M.'s case manager, it was not unusual for Fargo to discuss the disciplinary referral with her. She told Fargo that she observed the meeting with Ferguson but was not a part of it.

The next week B.M. came to her office with P-1 in hand. He was removed from Fargo's class. Madigan described him as quiet, concerned, troubled, mumbling and withdrawn. Since he seemed troubled, she asked if she could help him. He indicated that Mr. Ferguson had advised him not to tell anybody. When informed by Madigan that it would be all right with Ferguson, B.M. told her that he got Fargo into trouble,

stating, "well, he touched me." B.M. indicated that Fargo put his hand on his leg. He also stated that on another occasion Fargo poked him with a pencil. B.M. either pointed to his penis or used the word penis, making it clear that he meant that Fargo "poked his penis." B.M. stated that he was telling the truth. Madigan indicated that she questioned him, but he did not "back off his story."

On cross-examination, Madigan could not recall B.M.'s exact words to her. B.M. said he told Ferguson that Fargo touched him on the thigh or leg. She could not recall B.M. saying that Fargo moved his hand up nor did she think he used the words "private parts." She believed B.M. was telling her that Fargo touched him on the leg as a sexual gesture.

Questioned as to her deposition, she admitted that she had only mentioned the pencil incident. She indicated that Fargo touched B.M. on his penis with a pencil. She did not indicate in the deposition that he touched his "thighs." She contended, however, that she had given at her deposition the gist

of what he said. She zeroed into his penis being touched by the pencil because it seemed more damaging. Although she did not intentionally leave out the touching of the leg, she contended that it could be unclear.

In an effort to refute B.M.'s allegations, Fargo assumed the stand on his own behalf. He denied B.M.'s allegations. More particularly, questioned as to B.M.'s allegation that he touched B.M.'s inner thigh and moved his hand up to his genital area, Fargo stated that "never occurred." Questioned as to B.M,'s statement that Fargo took the eraser portion of the pencil and touched or jabbed his penis on one or two occasions, Fargo stated that, "certainly this did not occur." Questioned as to B.M.'s allegation that he told D.P. that he slugged Fargo with his fist causing Fargo to hit his head on the radiator, Fargo said, "that's not true." Similarly, confronted with D.P.'s testimony that B.M. told him that at some time in that year, B.M. had punched Fargo in the chest causing him to hit his head on the radiator, Fargo stated that that event did not

take place. He also denied touching B.M.'s "butt" in the hallway.

Fargo revealed that he got to know B.M. as a student. B.M. was reluctant to follow directions, do his class work or homework. He was disturbed about the work and believed he should not be in a special education English class. Fargo told him to talk to his guidance counselor or the child study team. Fargo stated that he talked to Mr. Ferguson about B.M.'s complaint about being in the class and B.M.'s acting up and causing trouble. He had noticed problems with B.M.'s behavior a few times prior to January 14, 1988.

Questioned specifically as to January 14, 1988, Fargo recalled that he issued B.M. a disciplinary referral because B.M. was complaining and making it difficult for students to pursue their lessons and difficult for Fargo to teach other students. Fargo told B.M. to see Mr. Ehrlich. B.M. left quite angry, indicating that he was going to get Fargo into trouble. According to Fargo, he had not had an argument with B.M. prior to

B.M. saying this.

Asked why he thought it was important to write in the referral that when B.M. left the room, he said, "I'm going to get you in trouble," he stated, "I thought that was a nasty thing to say." Questioned as to whether he was worried that B.M. was going to get him in trouble, he said, "I considered it. It might be possible." He alleged, however, that he was not afraid that B.M. was going to tell Mr. Ehrlich that he touched him.

When questioned about his follow-up to the disciplinary referral, he indicated that he thought it strange that B.M. just disappeared. He wanted to know what was going on and whether he had to plan for B.M. He opined that this referral seemed to be handled differently than the other referrals. Ordinarily, there would be a meeting after school with the department head, himself and Mrs. Madigan. He was curious as to why this procedure was not followed. He admitted that B.M. was sometimes an honest, respectful student. Although he did not have an

opportunity to socialize with Tortora, Fargo believed him to be honest and truthful.

On cross-examination he indicated that Ms. Glowacki told him that she was having problems with the Board of Education. He did not advise her on her claim nor did she ask him for his support. She stated that he telephoned her at least once to know if she had gotten a job and advised her on ads he saw in the paper.

Testifying on behalf of respondent was Anthony Tortora, employed as a teacher of the handicapped for ten years. He testified that he has known Fargo since September 1986 and knew B.M. for one or two years prior to 1987. He taught B.M. in his resource class. Aware that B.M. said that he had told him prior to January 1988 that Fargo improperly touched him, he alleged that B.M. never said that to him. He informed the prosecutor's office that B.M. had not told him he was touched by Fargo. Prior to January 27, 1988, he was not asked by anyone in the school district if B.M. told him he was touched by Fargo.

On cross-examination he indicated that he and Fargo did not teach the same periods. Although he could not recall whether he was asked his opinion of B.M., he admitted that he could have said he was a respectful, good kid. He described B.M. as a quiet kid who does his work and admitted he had a rapport with him. He stated, however, that he was not particularly friendly with him. The only discussion he recalled having with B.M. about Fargo centered on B.M.'s complaint that Fargo gave him too much work. Acknowledging that he knew if he did not report B.M.'s statement that Fargo touched him, action could be taken against him, he contended that if B.M. had told him he had been touched, he would have reported it to the authorities. He did not recall D.H., who was not his student, speaking to him about Fargo. Not socially friendly with Fargo, he stated that he has no bias against him.

Further testimony was offered by Eileen Glowacki, presently employed by the Essex County Services Commission as a basic skills teacher. She worked with Fargo as a

teacher's aid from September 1985 to June 1986 in Fargo's neurologically impaired class, teaching a group of students reading and English. Fargo told her which students to teach and was present in the room. She had no professional contact with Fargo in the school year 1986-87 but taught at the high school in September 1987 when Fargo taught there. She alleged that she did not observe Fargo do anything improper. Noting that she knows B.M. because her daughter and B.M. had attended Queen of Peace School together (B.M. was not one of her students), she stated that B.M. had not told Anthony Tortora in her presence that Fargo touched him nor did he tell her directly that Fargo touched him. Questioned as to whether she saw D.P., a student of hers, have an argument with Fargo and push him to the ground, she stated, "no."

On cross-examination, testifying as to her interaction with Fargo, she admitted that Fargo is a good friend of hers, and she could have had casual phone conversations with him during summer vacations. She alleged, however, that she would not lie for him.

On further questioning, she admitted that she has two cases presently pending against the board unrelated to the instant matter. She opined the board has treated her improperly and acknowledges she is angry at the board. She contended, however, that she did not hope that the board lost other cases.

TOUCHING AS TO D.P.

D.P., 17 years old and in the eleventh grade, was a student of Mr. Fargo's for resource math, first period, 7:53 a.m., five days a week while in the tenth grade in 1987. Referring to his class, he stated it was comprised of C.D., E.R., C.B. and himself. He met E.R. in September 1987. C.B. has been his friend since second grade, and he was "just friends" with C.D. whom he has known since grammar school. D.P. indicated that in November and December 1987 Fargo touched him in his private area (his penis). He rubbed him on the leg and touched him with a pencil on his penis. More particularly, D.P.

indicated that he was sitting to the right at Fargo's desk receiving instruction. Mr. Fargo's right hand was closest to him. He recalled that Mr. Fargo jabbed him one time with a pencil. D.P. said, "get out of here" and Fargo smiled. D.P. got up and looked at Fargo. On another occasion, while receiving instruction at Fargo's desk, Fargo poked him with a pencil. He told Fargo to get out of here and got up. He could not recall if he went back to his seat. He further revealed that Mr. Fargo rubbed his leg almost every day. In the beginning of the year, it seemed like his "sense of humor" but then, "Mr. Fargo started doing it more, and to everyone."

D.P. further indicated that Mr. Fargo touched him on the buttocks two different times. On the first occasion, Fargo patted him on the buttocks with his hand. On the second occasion, he bent over to pick something up when Mr. Fargo pinched him, albeit not that hard. D.P. stated that he threw Fargo on the ground and pushed him. Mr. Fargo hit him back.

More particularly, D.P. recalled that he had Ms. Glowacki as a teacher in Fargo's classroom. Fargo and two other students were in the class when D.P. arrived. Fargo was eating lunch, doing work and talking to Ms. Glowacki. When D.P. bent down, Mr. Fargo grabbed his buttocks and slapped him on the buttocks with his open hand. D.P. contended that he knew it was Mr. Fargo before he turned around. D.P. pushed Fargo with both hands in the chest area, and he fell backwards. He grabbed him around the back in a bear hug and threw him onto the floor. Ms. Glowacki was talking to some other student, and D.P. believed that she said, "stop." Fargo kicked him in the shins and he stopped because it hurt. He told only his friends. D.P. indicated that he was not disciplined for this incident.

In further testimony, D.P. recalled that at Christmas time, there were decorations on the ceiling in the classroom. He was standing next to Mr. Fargo's desk singing jingle bells. Mr. Fargo, seated at his desk, made a motion with his hand for

jingle "balls" near D.P.'s genitals as if he was grabbing them. D.P. recalled that Fargo's hand was in between D.P.'s legs and close to his genital area. Fargo said jingle bells while moving his hand. D.P. told Fargo to "get out of here." He did not tell anyone about the incident.

On another occasion, D.P. recalled he was showing off the smell of his cologne. He asked Fargo how he liked it, and Fargo said it was sexy. Mr. Fargo told D.P. he had tight jeans, a tight ass and looked sexy. D.P. told him to shut up. D.P. did not report the incident but told his friend B.M. He also believed that the students in the classroom observed it.

In further testimony, he recalled that around October, Fargo asked him to sit on his lap. D.P. claimed that he did it to test Fargo. When he saw Fargo's eyes, he knew something was wrong and got up. When Fargo asked him again to sit on his lap, he would not do it. Testifying further, D.P. indicated that if he called Fargo a jerk, Fargo would say, "what are you and your whole family?" The

students in the class sometimes said, "fuck you," and a couple of times Fargo said, "fuck you." He contended that he was not sent down to the principal for using such language and that Fargo cursed back at the students.

D.P. alleged that he was not directed to come after school. He admitted that Fargo gave him a hard time about work and threatened to call his father. He stated that he was not classified until September 1987. He did not resent this and believed it helped him.

In further testimony, D.P. indicated that in October 1987, Fargo rubbed him on the back, shoulder and the thigh of his leg. D.P. thought Fargo placed his hands on his shoulders "too much." He noted that Fargo rubbed his leg when giving him instruction. D.P. explained that at the beginning, he thought it was Fargo's sense of humor. When he heard Fargo described as a "fag," he told him to "get away." Referring to the rubbing of his back and leg, he indicated that he told Fargo that he did not like it -- the back was okay, but the leg was not. In November 1987,

Fargo poked him with a pencil. D.P. alleged that in fact on one occasion, Fargo touched his genitals with a pencil point. D.P. felt the pencil on his penis and contended that it "kind of hurt." The pencil did not go through the fabric of his pants. He recalled that Mr. Fargo had tried to get his attention. When D.P. responded by saying, "what the hell are you doing?" Fargo said, "let's do work." D.P. replied, "don't do that."

D.P. indicated that he did not tell any school officials about the incident. He told B.M. after B.M. told him of his experience. He told his parents that Fargo was "looney." Although at first he alleged that he did not tell them about the specific incident, in further testimony he indicated that he had told his mother about the incident, and she asked if he was all right. Although he noted that he sees a psychotherapist, he did not see the therapist for the situation with Fargo nor did he tell the therapist about what Fargo did. Questioned by this Judge, he indicated that he could handle himself. He had felt

uncomfortable with the situation but was not scared.

Fargo responded to D.P.'s allegations. He indicated that he taught D.P., classified P.I., math in the tenth grade. He described D.P. behaviorally as a little nervous and on edge and sometimes a behavioral problem. Academically, he was reluctant to get into an assignment. Once involved, he stuck to it to some extent. Questioned as to D.P.'s statement that on one or more occasions, Fargo jabbed his private parts with a pencil while he was receiving instruction, Fargo said, "it did not ever occur." Questioned as to D.P.'s testimony that in the presence of Eileen Glowacki, Fargo touched his buttock causing him to push Fargo backwards and throw him to the ground, Fargo contended that D.P. never did that, it never occurred, and he never touched D.P.'s behind. He further alleged that he did not make obscene gestures towards D.P.'s genital area, while D.P. did a rendition of jingle bells and did not say to D.P. "you have a tight ass today." He alleged that he heard D.P. ask the

students if he had a "tight ass."

Questioned as to whether he ever put his hand on D.P.'s leg, he stated that, without thinking, he might have put his hand on D.P.'s knee or his shoulder to get his attention. He stated that he does not rub people's legs.

TOUCHING AS TO S.S.

Although he alleged that he had no problems with Fargo, he stated, however, that around December 1987, Fargo tried putting his arm around him while helping him. Fargo told him to move his chair closer but he would not. When Mr. Fargo moved his chair closer to him and put his arm on the back of his chair, S.S. said, "you are not putting your arm on me. If you put your arm around me, I will throw you out of the damn window." Questioned by this Judge, S.S. stated that Fargo had not placed his arm around him; his arm moved around the chair, and S.S. believed he was going to touch him. After observing the incident with B.M., he was upset and was

afraid it could happen to him. In further testimony, S.S. indicated that Fargo "cursed everyone out." He used words like "fucking seat" or "shut the fuck up." He recalled that this happened three times, but he told no one about it.

In further testimony, S.S. revealed that D.H. did not have to sit close to Mr. Fargo. She could sit on the side of the desk while the boys had to sit close. He recalled that Fargo told him to stay after school on several occasions. He did not come after school but did not get into trouble.

TOUCHING AS TO C.D.

Next to testify was C.D., 20 years old, and in the twelfth grade. He stated that he had had Mr. Fargo in eleventh grade (1987-88) for first period English, 7:50 to 8:35, five days a week. The class consisted of K.B., D.P., C.D.; E.R. had graduated. Although he stated that from September 1987 to January 1988 he had no problems with Mr. Fargo, he explained that he received

individual instruction seated at the corner of Fargo's desk next to Fargo. Their bodies came into contact as they shared a book. Their knees and shoulders were together and Fargo sometimes leaned on him. Sometimes Fargo reached forward to look into the book, and his hand rested on C.D.'s knee. C.D. did not recall how many times this occurred and stated that he had not given it much thought. He did not believe the touching was sexual simply because of the proximity. He stated that on one occasion when he stood up to leave his desk, Fargo hit him in the rear (buttocks). He was not sure with what. No one else was there, and no one else could have touched him. This never happened again.

He described the atmosphere in the class as good. Although they did their work, there was back and forth bantering on occasion. As an example, he stated that if he said, "go home suck my dick," Fargo would respond, "yeah, you'd love it. Do your work." He could not recall the number of times this occurred but remembered that there were no disciplinary referrals. He stated

that the other students used language such as this. E.R. cursed at Fargo and Fargo responded. He stated that these exchanges happened once in a while.

He remembered that Mr. Fargo gave him a t-shirt for his birthday. He said, "thank you" and there was no further discussion regarding the gift. Mr. Fargo never told him why he gave it to him, and he recalled no conversations regarding feeling bad about being 19 in his junior year. He threw the shirt into his locker. He believed that Mr. Fargo was trying to be nice to him. He never saw Fargo argue with or strike a student. He was not friendly with Fargo but thought he was a good teacher.

C.D. stated that in September 1987, his best friend was his girlfriend. He did not "hang around" with B.M., D.P., K.B., B.R. or D.H. He was friends with E.R. and D.S. He described D.P. as hyper but not a troublemaker. D.P. did not curse that much, but stormed out of the room.

Further support for C.D.'s allegations was offered by D.P. D.P.

indicated that he observed Fargo's desk and students. From his desk, to the left of Fargo's, approximately six feet away, he could see Fargo and the students seated. He could see the student's whole body and could see Fargo's hands and the top portion of Fargo's body. He recalled that he observed Fargo rub C.D.'s leg and heard C.D. say, "get out of here." This occurred a couple of times.

Fargo testified as to his interaction with C.D. He indicated that C.D. was 19 years old during Fargo's second year at the high school and was having difficulty completing the courses. Questioned as to why he gave C.D. a t-shirt, Fargo alleged that he discussed with Veronica Madigan the idea of giving C.D. something that would make him feel better about getting older and being in a grade that was not appropriate.

Fargo recalled that when C.D. complained that he perspired a great deal, Fargo suggested that if he wore a t-shirt, it would not be so much of a problem. Fargo recalled that C.D. seemed surprised at the suggestion. It seemed like a good idea to

him. C.D. mentioned that he did not have t-shirts and does not usually where them.

TOUCHING AS TO K.B.

K.B. stated that he went up to Mr. Fargo's desk for instruction. He stated that while he was up at the desk, Fargo put his arm around his chair and on his knee. Referring to his interaction with Fargo in the eighth grade, he stated that he also sat on one side of Fargo. Fargo put his arm around him the same as he did in the ninth grade. He recalled that on two occasions when he had to make up a test after school, Mr. Fargo gave him a ride home. Nothing unusual occurred during the ride.

K.B. further revealed that he did not think that there was anything unusual with Fargo touching his chair or his knee. He did not believe it had a connotation and considered Mr. Fargo to be a good teacher. He stated that Fargo cursed in class when he got angry or the students were bad. Fargo would say "shit" but nothing more.

On questioning by this Judge, K.B. indicated that when Fargo had his hand around the chair, as he leaned back on the chair, he would feel Fargo's arm. He also felt Fargo's hand on his knee. Fargo's hand was on his left kneecap as he sat to the left of Fargo. Fargo's hand moved while they were doing work. After awhile, it bothered him. He felt that a teacher "should not do that." Although he felt uncomfortable, he said nothing.

TOUCHING AS TO R.R.

Next to testify was R.R., 17 years old and in the eleventh grade. He had Mr. Fargo for the first time as a teacher in the tenth grade. He was in seventh period English class that met between 12:30 and 1:15, five days a week. He revealed that Fargo, who sat to his left when he received instruction, put his hand on his knee or thigh almost every time he went up to Fargo's desk for instruction. He felt uncomfortable each time Mr. Fargo did this. He told Fargo to stop, and Mr. Fargo did. Each time he went up for

instruction, he had to tell Mr. Fargo to stop. Frequently, R.R. moved away. He could not recall if Fargo said anything. He believed that Fargo said "move closer" but could not recall if Fargo then touched him again. He told no one about this. He heard Mr. Fargo curse infrequently. He said "fuck" a few times, but R.R. could not recall the circumstances.

In response, Fargo, questioned specifically as to whether R.R. told him not to put his hand on his leg, stated that he did not remember him saying anything to that effect. He did not think so.

TOUCHING AS TO J.B.

J.B., 18 years old, and in the twelfth grade testified that in 1987-88, he had Fargo as a teacher for English resources, fourth period, 10:30 to 11:15. There were five or six students in his class. He recalled that on one occasion when he was sitting with "Mike" and Fargo was at his desk, around Christmas time, Fargo said to him, "did

you have fun screwing your mother last night?" J.B. could not recall if Fargo said "screw" or "fuck" and testified that it shocked him. He responded, "that's not right" and Fargo smiled. J.B. was offended but did not report this to anyone.

J.B. recalled that approximately two weeks after the first incident, Fargo repeated the same words while J.B. was alone at his locker in the hallway. J.B. grabbed Fargo by his shirt and slammed him against the locker and said, "this is your warning. Don't ever say it to me again. It's not right." He recalled that Fargo said nothing because Mr. Ferguson came down the hall and asked what was going on. J.B., who believed that when Ferguson arrived at the scene, he and Fargo had already separated, recalled that he said, "just fooling around" and went back to class. J.B. had no discussion with Mr. Ferguson about this but told his mother about the incident the same day. His mother stated that Mr. Fargo needs help. J.B. did not know whether his mother contacted anyone at the school about the incident. J.B. alleged that

he also told D.P.

J.B. further alleged that on one occasion at the end of fourth period, Fargo slapped him on his behind. J.B., who did not know why Fargo hit him, said, "don't do that again. I'll kick your ass." Fargo did not respond. J.B. believed he told his mother.

In further testimony, J.B. revealed that Fargo used the word "fuck" and said "sexual things." On one occasion, he asked J.B. if he had fun screwing his girlfriend. J.B. informed him that he was out of line. J.B. revealed that in giving individual instruction, Fargo would move his chair closer to the students and then "say the words." J.B. was afraid to sit too close to Fargo and pulled his chair away. He recalled that on one occasion, Fargo placed his hand on his knee. J.B. moved it and said, "don't put your hand on my knee." Fargo did not respond but did not do it again.

On cross-examination J.B. indicated that in September 1987, he had known B.M. for two and one-half years, having worked on jobs with him. B.M. was his good friend in

1987 but is not currently his friend. D.P., his friend in 1987, is presently his best friend. D.P. did not tell him what he was going to testify to. J.B. alleged that he did not provoke Fargo to make the statements that he made to him nor did he recall a dispute with Fargo about a grade.

S.S. testified as to his recollection of the interaction between J.B. and Fargo. S.S. recalled that J.B. came into the classroom "hotheaded" towards Mr. Fargo. He assumed it was over a test score. J.B. yelled about his grade on a test. Fargo wanted the discussion to take place in the hallway. A shoving, wrestling match then occurred in the hallway. It was not sexual. Mr. Ferguson walked between them. He told J.B. to go to his office and Fargo to go back to his classroom. S.S. recalled that Mr. Ferguson came back with J.B. and questioned Fargo in front of the class. S.S. admitted that at his deposition he had stated that he saw J.B. pick up Mr. Fargo and throw him against the lockers and that Mr. Ferguson came back with J.B. and questioned Fargo about a

test score.

On redirect, S.S. indicated that he did not hear the discussion with Fargo, J.B. and Ferguson. He recalled that about one and one-half weeks after the fight, he heard Fargo ask J.B., who had come into his class, to talk to B.M. about how his mother had been last night and how he had liked "screwing his mother." He stated that J.B. was going to go after Fargo -- he looked like he was going to kill him but B.M. placed himself in front of J.B., calmed him down, and said it was not worth getting suspended for.

Fargo testified as to his concept of J.B. as a student. Noting that he is classified P.I., he opined that J.B., to whom he taught English, seemed to handle the material fairly well. He noted that it was sometimes tough to get him started. He would rather have a conversation with another student. If a friend stopped by the door, J.B. would encourage him to have a conversation. Questioned as to J.B.'s testimony that on one or two occasions Mr. Fargo questioned him about whether or not he

enjoyed or had sexual contact with his mother the prior evening, Fargo said he "never had that kind of discussion."

Confronted with J.B.'s allegation that he pushed Fargo against the locker for making those statements, Fargo could not recall that occurring. Questioned about S.S.'s contention that he observed Fargo and J.B. fighting, and Ferguson separating them, Fargo stated that to his recollection, that event never occurred. Ferguson never separated him from J.B.; never directed J.B. to go to his office; and did not have a discussion with Fargo about a low grade J.B. was upset about, or a problem between Fargo and J.B.

On cross-examination he remembered being in the hall with J.B. and Mr. Ferguson coming by. Questioned as to whether or not there was an argument or scuffle with J.B., he indicated that he did not usually argue. Questioned as to whether there ever came a time when Mr. Ferguson went by J.B.'s locker when he was pointing a finger at J.B., he stated he did not exactly recall. He stated,

however, that Mr. Ferguson never broke up a fight between him and J.B. and indicated that "he does not fight with students." He indicated that he never slapped J.B. on the ass. He did not "really remember" if J.B. ever asked him to remove his hand from his knee. Questioned as to whether he ever put his hand on J.B.'s leg, he stated, "I don't think so. It's hard to remember. It's a long time ago."

GENERAL TESTIMONY OF FARGO IN REFUTATION OF CHARGES

Referring to the charges, Fargo indicated that he denied each and every charge against him by the Board of Education. He stated that none of them are accurate and that he is upset by them.

Confronted with certain students' testimonies that when they came up to his desk for individualized instruction he touched their knee or kneecap, Fargo responded that, considering the position of the room and the arrangement of the furniture and what was

necessary to keep their attention, he could very likely make physical contact. He alleged, however, that he never purposely made physical contact to make anyone feel uncomfortable or to hurt them in any way. He could not recall putting his arm around the back of the chair or touching students' shoulders while they were sitting next to him getting individualized instruction. On further questioning, Fargo admitted that he has a habit of getting someone's attention by putting his arm on their shoulder or making contact, besides simply telling them to look at something.

Questioned about his alleged use of vulgar language or obscenities in class, he indicated that based on his training and professional readings on correcting the problem of foul language, it might be necessary to discuss or repeat the inappropriate words to reduce that type of language. He stated that, "it's always been an emphasis of my education, working with special education students that you need to be as specific and concrete as possible to be

most effective." He indicated that he discussed how to reduce or eliminate foul language with Bill Ferguson. He explained what he had learned and what he was doing -- using profanity in a discussion to reduce it. Ferguson did not disagree and felt it was a good idea.

Questioned as to whether he ever used curse words or obscenities just for the sake of using the language, he stated that he never directed any kind of a verbalization of any kind to make someone feel uncomfortable or upset. He never used foul language in the sense that most people understand it.

On cross-examination, although he indicated it was sometimes necessary to repeat profanity to reduce it in the classroom, he could not give an example of that. Alleging it was ineffective to be vague with students by saying, "don't say that," he contended that he said something like, "don't say shit." He stated that he never used the word "fuck" or "shut the fuck up" but may have said "shit" to himself. Questioned as to whether he ever used the word "come" in class with a sexual

connotation, he indicated that he did not but B.M. made a joke out of it one day. He alleged that he never permitted students to use profanity without correction.

Questioned about the pictures that he took of the classroom, he indicated that the pictures were taken in December 1987 as part of his collection of pictures. He explained that during college, a professor had strongly suggested the students have a type of visual resume, consisting of pictures of the efficient organization of the room. He took pictures every year of his career of all of the rooms he had taught in, and students doing their work. He indicated that he brought his camera in on a variety of occasions, especially if the class was doing well. He filed the pictures in an album or used them on bulletin boards to build the students' self-esteem. At the end of the year, he brought the complete album in (he had two volumes) and gave all of the students in his class an opportunity to see it and talk about the pictures. He indicated that Blanco was very impressed with the album he showed him of

previous classes, since it gave him a visual demonstration of what Fargo had been doing.

On direct examination he indicated that when he showed the pictures to William Ferguson, Veronica Madigan, Dr. Killeen, Bob Kinlock and Anthony Blanco, they complimented him on the idea. Although he indicated the pictures demonstrate his organizational ability, he admitted that there was nothing on the bulletin board in the pictures presented to the court. He alleged that sometimes it was wise not to have a filled bulletin board. He noted that the picture of the students is a good candidate for the bulletin board because it demonstrates that they are working diligently.

Questioned as to how the pictures demonstrate his organizational ability, he explained that pictures are part of a collection. If one looked at every picture, one would have an idea of how the entire room was set up. Noting that each teacher arranges furniture as he sees fit, he explained that he arranged the furniture as it appeared in the pictures. There are four tables in the room

approximately two and one-half feet apart, usually with one student seated at it. He placed the desk in a catty corner position believing it to be the best position so that it did not get in everyone's way. He also did not want the desks so close to the tables that he would be distracted in his teaching or his teaching would distract the students. He was also cautious about a student being embarrassed about the type of work he was doing.

He contended that the left corner of his desk was approximately two feet from the radiator (R-24) and it did not take effort to negotiate a chair around the corner of his desk to get around to the back of his desk. He did not seat students when he taught them on a one-to-one basis by having them sit at the end of the desk in front of the radiator rather than behind the desk where he sat.

On rebuttal, petitioner called William Ferguson to the stand to testify. He indicated that he heard Mr. Fargo testify about his theory as to how to reduce profanity in the classroom. Questioned as to whether

Fargo ever discussed that theory with him at any time, he stated, "no." He further alleged that Mr. Fargo never showed him photographs. He indicated that to the best of his recollection, he was not aware prior to January 14, 1988 that Fargo had taken pictures of his classroom and students. Questioned as to whether he had ever seen photographs on Fargo's bulletin board, he stated, "not that I know." He admitted, however, that he had seen Fargo with a camera during the school day. He did not question him as to what he was doing with the camera.

DISCUSSION

It is clear that the burden of proof is on petitioner to demonstrate, by a preponderance of the credible evidence, unbecoming conduct on the part of John Fargo. Respondent would have this tribunal find that Mr. Fargo, Mr. Tortora, Mr. Ferguson, Mr. Ehrlich, and Miss Glowacki are credible in their denial of unfounded allegations of impropriety made by B.M. In addition,

respondent argues that the classified students suffering from mental impairments are and were friends and are not credible.

Respondent argues that the allegations of impropriety are inconsistent and, more particularly, that B.M. is not credible. Respondent contends that B.M.'s memory is selective; that he is biased against Mr. Fargo; that he has an attitude problem; that is, that he did not like Mr. Fargo because Mr. Fargo made him do school work; that he complained about the special education resources program, believed that the work was "baby shit." Essentially, he acted up and caused trouble. Respondent points out that Mr. Tortora denied that B.M. alleged he had been improperly touched by Mr. Fargo. In addition, Miss Glowacki testified that B.M. did not tell Mr. Tortora in her presence that Mr. Fargo touched him.

Respondent points to the differences in words such as the use of "private parts," "penis," or "certain spot." Respondent notes the differences in and manner of stating what Mr. Fargo did, the

discrepancies in the language used. According to Respondent, B.M. as well as the other students constantly changed their allegations to conflict with their prior versions and the versions of other students.

In addition, respondent notes that the allegations of numerous school officials and teachers idly sitting by while witnessing physical assaults and learning of sexual allegations involving Fargo and students is absurd and exceeds the uppermost limits of a good faith action.

Respondent notes that Mr. Fargo is a highly respected teacher. In fact, respondent argues that petitioner actually recognizes that the allegations are incredible since they have not brought charges against Mr. Ferguson, Mr. Tortora, and Miss Glowacki.

On the other hand, petitioner asserts that the students are not friends and that the witnesses' credibility is supported by the testimony. Petitioner asserts that the students are not friends. They are in different class years. They complain about similar problems with Mr. Fargo. As pointed

out by petitioner, the students suffered major inconvenience, nervous tension and anxiety in order to come forward and tell the truth. Petitioner asserts that no reason exists for this court not to believe the students.

In further argument, petitioner points to the unpersuasive nature of the factual testimony of John Fargo. Petitioner asserts that Mr. Fargo was an unusual person. Petitioner points out that Mr. Fargo has a post office box, which indicated paranoid behavior. Petitioner asserts that he has forgotten his employment at Rochelle Park.

Pointing to the pictures that Mr. Fargo took of the classroom and the fact that Mr. Ferguson stated he never saw the pictures, petitioner seems to assert that the taking of pictures is extremely unusual. Petitioner points to the furniture trap, by which petitioner means that the furniture is not in the best place and is hard to negotiate.

Referring to the disciplinary referral, petitioner contends that Fargo was worried about what B.M. would say and thus issued the disciplinary referral. Petitioner

notes that Mr. Fargo gave a T-shirt to one of his students which bore no relationship toward a perspiration problem.

In further argument, petitioner points to the "profanity reduction formula" for Fargo's approach to reducing profanity in the classroom. Petitioner points out it is difficult to explain and that Mr. Ferguson denied hearing about this formula. In addition, petitioner points out that Mr. Fargo admits a habit of making contact with the students. He admits that, without thinking, he might have put his hand on D.P.'s knee or shoulder.

In sum, petitioner contends that the testimony of the witnesses is credible and that Mr. Fargo's testimony is incredible.

It is clear to this tribunal that this case turns on credibility. "Testimony to be believed must not only proceed from the mouth of a credible witness but must be credible in itself. It must be such as common experience and observation of mankind can approve as probable in the circumstances." In re Perrone, 5 N.J. 514, 522 (1950).

At the outset, it to be noted that when determining the credibility of a pupil-witnesses' testimony, the judge must balance the witnesses' believability against any possible biases which he holds.

In Palmer v. Board of Education of Audubon, 1939-49 S.L.D. 183, 188, the Commissioner of Education recognized that the "testimony of children...against a teacher, whose duty it is to discipline them, must be examined with extreme care. It is dangerous to use such testimony against a teacher; it is likewise dangerous not to use it." This was echoed In the Matter of the Tenure Hearing of Ronald E. Roemmelt, OAL Docket Number EDU 4722-86 at Page 16, where the judge, citing School District of Red Bank v. Williams, 3 N.J.A.R. 237, 244 (1981) and cases cited therein, stated that the "testimony of child witnesses must be viewed with extreme caution, and...in some instances it may be dangerous to use such testimony against a teacher." In Roemmelt the witnesses were 11 and 12 years old, and as such the judge "made a special effort to pay close attention to their

credibility, taking into account their ages and whatever biases they might have in the matter."

This is not to say that the pupil's testimony should be suspect, but merely to point out that it should be accepted with the knowledge that the pupil may possibly harbor some ill feelings toward the teacher which might result in biased testimony. Certainly, the pupil's testimony should not be dismissed unless there is good reason to believe that his testimony is biased.

In the instant matter, I have paid close attention to the students' credibility, taking into account their age, whatever biases they may have in this matter. Having done so, I am compelled to agree with petitioner. The students were perfectly competent and particularly convincing in terms of credibility. I should state to begin with that the students here were not as in Roemmelt 11 or 12 years old, but were close to adult age. Thus, the potential swaying of such students seems less likely. They understood what they were saying and the ramifications

thereof.

Moreover, although respondent implied that since classified the students had problems which interfered with their believability, there is little or nothing in the record to suggest that a perceptual or neurological impairment would make these particular students incredible. There is nothing in the record to suggest that they could not distinguish right from wrong or, more to the point, the reality of the situation.

Although some of the students clearly had certain educational and psychological problems, Respondent did not demonstrate that these interfered with the ability to recount facts and events. Only the suggestion was made. With this backdrop, I have considered other factors which support the students' credibility. In fact, I am compelled to agree with petitioner's credibility arguments:

1. The students are not all friends. It is clear from their testimony that although some students were friends with

some of the other students, not all of the students were friends.

2. They complained about similar problems with Mr. Fargo. A great deal of the testimony focused on the fact that Mr. Fargo would touch knees and rub legs. There may be a difference in the manner of stating what Mr. Fargo did, but this was irrelevant because the allegations remained consistent.

3. The testimony of the students was credible and worthy of belief. They testified from no other motivation, as pointed out, other than the fact they wanted to come here and testify to what they believed had occurred. Their testimony, quite simply, had the ring of truth.

4. No real reason exists not to believe the students. Although it was argued and discussed above that the students had certain problems, the students who came forward were clear and believable in their testimony.

5. The fact that Mr. Tortora indicates that B.M. did not tell him about Mr. Fargo touching him is insufficient to destroy

B.M.'s testimony. Similarly, the fact that Mr. Tortora was not charged with not reporting that event is similarly irrelevant. His, B.M.'s allegation of impropriety as a whole, were consistent and convincing. Granted, there were minor word variations, but this did not change the believability of B.M.'s testimony. His dislike of Mr. Fargo's class and the work there is an insufficient reason to believe that he did not tell the truth. Just because he had some behavioral problem in Mr. Fargo's classes also is insufficient to support respondent's argument that his testimony was not believable. In fact, his testimony was consistent and corroborated by others who had no issue with Mr. Fargo.

6. The idea of a number of teachers sitting idly by is not borne out by the allegations of Petitioner.

7. I think it is important to note here that I am not persuaded and was not persuaded by Mr. Fargo's denial of the charges. First, it is to be acknowledged that he admitted touching students from time to time. In addition, his testimony in regard to

the profanity reduction formula was not persuasive. He alleged that he never cursed at the students but could not give examples of having used this profanity reduction formula. In addition, Mr. Ferguson had not heard of this formula.

It must be noted that in making these credibility determinations, I am not particularly persuaded by the fact that Fargo had a post office box, that he forgot prior employment, that he took pictures of the classroom, that there was a furniture trap, that he made a disciplinary referral, and that he gave a student a T-shirt. These may be odd, but that is it. They do not persuade me that he was not a credible person.

While some may arguably be corroborative of the charges, there is no sufficient connection established between any more of these to permit the conclusion that they have such legal significance. My determination in this case does not rest in any manner on any one or more of these factors.

FINDINGS OF FACT

Given the credibility determinations made here, I make the following findings of fact based on the students' testimony:

1. In September 1987, John Fargo touched the genitals through the clothing of a male student, B.M., with his hand in class.

2. Between Thanksgiving and Christmas 1987, John Fargo touched the genitals through the clothing of a male student, B.M., three times with the eraser end of a pencil.

3. Between September 1987 and January 26, 1988, John Fargo pinched the buttocks of a male student, B.M.

4. John Fargo between September 1987 and January 26, 1988 touched the thigh and groin area of a male student, B.M.

5. From September 1987 through January 26, 1988 John Fargo repeatedly touched and rubbed the leg and inner thigh of a male student, D.P., in his classroom.

6. Between September 1987 and

January 26, 1988, John Fargo touched the penis through the clothing of a male student, D.P., twice with the eraser end of a pencil.

7. Before Christmas 1987, John Fargo twice grabbed the buttocks of a male student, D.P., in a classroom causing D.P. to forcibly repel Fargo by throwing him to the ground.

8. Prior to Christmas 1987, a male student, D.P., was standing under a decorative ball-shaped Christmas ornament in class singing jingle bells. John Fargo attempted to grab the genital area of D.P.

9. Between September 1987 and January 26, 1988, John Fargo, on several occasions, would make inappropriate and indecent remarks to a male student, D.P., in class such as, "Oh, you have a tight ass today."

10. Between September 1987 and January 26 1988, John Fargo consistently used improper, indecent, sexually provocative and profane language in class.

11. On or about October or November 1987, John Fargo hit the buttocks of

a male student, C.D., in class.

12. In December 1987, John Fargo approached a male student, J.B., in the school hallway and stated to him, "have fun with your mom last night screwing her," so upsetting J.B. as to cause him to push John Fargo against the locker.

13. Between September 1987 and January 26, 1988, John Fargo put his hand on the knee of a male student, J.B., requiring J.B. to push Fargo's hand away.

14. Between September 1987 and January 26, 1988, John Fargo approached a male student, J.B., and said to him, "did you screw your girlfriend last night?"

15. Between September 1987 and January 26, 1988, John Fargo has engaged in an established sexually abusive practice of touching the knees, inner thighs, buttocks and genital area of male students.

16. Between September 1987 and January 26 and, 1988, John Fargo has engaged in a pattern of the use of highly inappropriate, sexually provocative and profane language in classrooms in the presence

of classified students.

17. Between September 1987 and January 26 1988, John Fargo by and through his conduct and actions as referred to herein, and otherwise as established through statements made by students formerly in his classes, established an inappropriate atmosphere in his classroom, of fear, harrassment, uneasiness and uncomfortableness to the detriment of all students, manifesting itself in the unwillingness and refusal of students to appear after class.

PENALTY

Next to be addressed is the appropriate penalty. Although respondent would have this tribunal conclude that removal is not warranted, it provides no authority for this proposition. He argues that respondent's excellent record would mitigate against this conclusion.

Petitioner, on the other hand, argues that charges of sexual misconduct involving students, if proven, should and have

resulted in the dismissal of teachers, an otherwise excellent record notwithstanding. Petitioner argues that in cases involving allegations of sexual misconduct, the presumption is that the charges will warrant dismissal if proven.

I have considered the penalty to be imposed and must agree with the result sought by Petitioner. In support, I note that the Commissioner of Education had the opportunity to consider in In the Matter of the Tenure Hearing of Richard Wolf, 1987 S.L.D. (July 1, 1987), charges of unbecoming conduct against the respondent, a tenured elementary teacher, for alleged improper touching of female students, ridicule of students and threats to students for reporting such alleged conduct. The Commissioner directed that the respondent be removed from his position as a tenured teaching staff member. In reaching his determination, the Commissioner held:

"The Commissioner, though, does question the ALJ's characterizing of respondent's touching of the girls as being

'without prurient or lascivious intent' and instead characterizing the incidents as subjecting them 'to embarrassment' and 'hostility rather than fondness.'" (Initial decision, at page 15). The Commissioner finds it unnecessary, however, to determine whether respondent's motives were governed by one or the other or both. He relied instead upon his clear perception from the record before him that such actions did indeed occur and were entirely inappropriate. See In the Matter of the Tenure Hearing of George McClelland, supra, citing In the Matter of the Tenure Hearing of Frederick L. Ostergren, School District of Franklin Township, 1966 S.L.D. 185 as follows:

"It is the Commissioner's judgment that parents have a right to be assured that their children will not suffer physical indignities at the hands of teachers, and teachers who resort to unnecessary and inappropriate physical contact with those in their charge must expect to face dismissal or other severe penalty." (Wolf at 38).

The Commissioner in response to

the respondent's argument that In the Matter of the Tenure hearing of George McClelland, School District of Washington Township, Mercer County, OAL Docket Number EDU 5284-82 (February 10, 1983), reversed by the Commissioner (March 25, 1983), aff'd by the State Board of Education (July 6, 1983), aff'd by the Appellate Division of the Superior Court (N.J. App. Div., July 20, 1984, A-152-83T2) (unreported), was distinguishable from the matter then before him (Wolf) because therein the respondent was dismissed for insubordination, not for improper touching found such argument to be without merit. The Commissioner then warned:

"The Commissioner wishes there to be no doubt whatsoever that the McClelland case stands for the proposition as stated in many other similar cases, that improper touching of students will not be tolerated." (Wolf at 38-39).

The Commissioner recounted that McClelland was found to be guilty of conduct unbecoming a teaching staff member and of insubordination. The Commissioner stated in

McClelland:

"Further, the Commissioner has difficulty with the concept of the 'father figure' advanced under the present circumstances. Surely each child, boy or girl, should be treated with the warmth and friendliness to be exercised by any good teacher without engaging in questionable bodily contact. The Commissioner is fully cognizant that good teachers often use a quick hug or a pat on the head as a tactile reinforcement of a healthy relationship; always, however, in full cognizance of age, maturity and sex of the recipient. In the Commissioner's view, the exercise of judgment and restraint is an essential ingredient to successful teaching. Respondent's proclivities herein far exceed the bounds of good judgment and restraint. The Commissioner so holds.

"The Commissioner finds nothing in the record by way of explanation of respondent's philosophy to include the need for him to have his back scratched by female pupils. Respondent admitted that on frequent occasions he scratched pupils' backs and the

pupils scratched his. The Commissioner finds this behavior of respondent, along with other questionable physical contact, to constitute unbecoming conduct. Such conduct, particularly in light of his having been advised and then ordered by his administrator to cease and desist, constitutes insubordination." That's McClelland at 245, 246.

Thus, in Wolf, the Commissioner determined that "based not only upon the bra-snapping incidents alone, but also for the additional reasons set forth in the initial decision, the Commissioner finds and determines, in accord with McClelland, supra; Redcay v. State Board of Education, 130 N.J.L. 369-371 (Sup. Ct. 1943), aff'd 131 N.J.L. 326 (E. & A 1944) (unfitness shown by a series of incidents); and In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967) (unfitness shown by a single incident) that respondent herein is guilty of conduct unbecoming a teaching staff member warranting his dismissal."

It is to be noted that Wolf was reversed and remanded by the Appellate

Division. The Appellate court reversed on procedural grounds. More particularly, exclusion of petitioner from the courtroom during student witnesses' testimony was held to bear a prejudicial effect on petitioner's procedural rights to confront witnesses and confer with counsel.

I am compelled to point out, however, that in a footnote the Appellate Division stated, "we have not commented directly on the legal theory under which petitioner was dismissed, i.e. that the touching even without licentious purpose, and the name calling, required dismissal, irrespective of the fact that petitioner had never been warned or counseled concerning this matter. We note, however, that both the A.L.J. and Commissioner based their decisions in part upon In re Tenure Hearing of George McClelland, 1983 S.L.D. 19, aff'd A-152-83T2 (App. Div. 1984) (unreported). Both the Commissioner and this Court in McClelland stressed that the penalty for dismissal was appropriate on the grounds of insubordination, since the petitioner in McClelland had been

once warned and later once again specifically directed concerning his practice of stroking and touching female students. We note that in the case before us, there were no warnings nor apparently even a consideration of a penalty less than dismissal after the first reporting of the incidents, whereas in McClelland, dismissal was not considered appropriate until charges were brought after the third reporting of the incidents."

That's Page 14 and 15, of the Appellate Division decision in Wolf.

Although this footnote could arguably mitigate against removal here, such a result seems improper. The footnote was clearly dicta on the part of the court and is so stated by the court to be. Further, it is clear that in Wolf, a determination had been made that the touching was without licentious purpose. Such is not the case here.

Clearly, the allegations against respondent are sexual in nature and not simply inappropriate touchings. In Wolf, supra, the touching involved bra snapping. While such touching, as the Commissioner warned is

inappropriate, indefensible and not to be tolerated, it is much less serious than the allegations herein which have been proven.

As is clear from the findings of fact, the touchings at issue here are of a very personal and disrespectful nature. To require warnings against such touchings to a teacher prior to removal is to suggest that a teacher must be told that such action is improper.

The penalty in Wolf, albeit overturned on procedural grounds, was dismissal. Nothing less is sufficient or warranted here. See also In the Matter of the Tenure Hearing of Carl Gregg, School District of the City of Atlantic City, OAL Docket No. EDU 5696-88, aff'd, Commissioner of Education, June 2, 1989, wherein the ALJ in finding that Gregg had sexually harrassed T.R. and did have physical sexual contact with, and sexually harrassed M.J. in the 1987-88 school year, stated that sexual contact by a teacher with a pupil is a violation of the teacher pupil relationship and may have life long consequences.

The ALJ, in removing Gregg from his tenured position, stated that "the Commissioner has always held that teaching is a public trust, and its violation requires a heavy penalty." See In the Matter of the Tenure Hearing of Jacque L. Sammons, School District of Black Horse Pike Regional, 1972 S.L.D. 302 and In the Matter of the Tenure Hearing of Ernest Tordo, School District of the Township of Jackson, 1974 S.L.D. 97. Indeed, a single incident of touching as proven herein should warrant dismissal. See, In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967).

As was conformed by the Commissioner in Gregg, at 16 the highest court in New Jersey ruled that unfitness to hold a position might be shown by one incident if sufficiently flagrant or by many incidents.

The gravity of any of the several incidents proven in the matter before me today cannot be minimized. However, even if it is determined that one incident alone is not sufficiently flagrant to warrant dismissal, there exists ample authority to warrant the

dismissal of John Fargo if the series of incidents approach is followed.

Following the direction of Redcay, it must be concluded that even if one incident as alleged and proven herein is insufficient to warrant the dismissal of John Fargo, the series of incidents alleged and proven here is sufficient to require the dismissal of John Fargo. See In the Matter of the Tenure Hearing of Anthony Pasquale, Elizabeth School District, Union County, OAL Docket No. EDU 6879-83 (Nov. 22, 1983), aff'd by the Commissioner (Jan. 09, 1984), aff'd by the State Board of Education (Sept. 5, 1984), wherein respondent was dismissed for unbecoming conduct when it was established that his repeated genital touching of his male students was improper.

Despite the singularly egregious nature of the incidents testified to herein, the whole series of incidents involving not only the touchings, but the language permitted and, in fact, encouraged by John Fargo by example and otherwise, to be used in class, atmosphere of fear, uneasiness,

uncomfortableness in class, the harassing nature of the touchings, the total lack of control on the part of John Fargo, the disrespectful manner in which John Fargo treated students who vocalized their desire to have his touchings cease by failing to refrain and, in fact persisting with the touchings, and the general lack of maintenance of an acceptable educational environment in the classroom warrants his dismissal.

CONCLUSION

I conclude that the Board's determination to dismiss respondent is affirmed, and it is hereby ordered that the charges against Mr. Fargo of unbecoming conduct are sustained. It is ordered that Mr. Fargo be removed from his position with the North Arlington Board of Education.

(Whereupon, the hearing was concluded.)

APPENDIX

Witnesses

For Petitioner:

Charles Ehrlich
William Ferguson
David Roden
Veronica Madigan
M.M.
B.M.
D.P.
S.S.
C.D.
K.B.
R.R.
D.H.
J.B.
Anthony Blanco
Alyson Blake

For Respondent:

Anthony Tortora
Claire Green
Margaret Rogatis
Eileen Glowacki
Katherine Killeen
John Fargo

List of Exhibits

P-1	Disciplinary referral for B.M., dated January 14, 1988
P-2	Identification
P-3	Identification
P-4	Memo to John Fargo from Anthony Blanco, dated January 27, 1988

R-1	Identification
R-2	Identification
R-3	Identification
R-4	Identification
R-5	Certificate for teacher of the handicapped for John Fargo, dated May 1975
R-6	Certificate of speech correctionist, dated April 1977, for John Fargo
R-7	Teacher's application form for John Fargo to North Arlington public schools, dated November 16, 1979 (5 pages)
R-8	Teacher evaluation for John Fargo, period of observation, February 28, 1980, 9 to 9:30, school year 1979-80 (2 pages)
R-9	Teacher evaluation for John Fargo, period of observation, January 8, 1981, 9:35 to 10 o'clock, school year 1980-81 (2 pages)
R-10	Teacher evaluation for John Fargo, period of observation February 12, 1981, 9:30 to 10 o'clock, school year 1980-81 (2 pages)
R-11	Teacher evaluation for John Fargo, period of observation October 9, 1980 from 10:45 to 11:20, school year 1980-81 (2 pages)
R-12	Teacher evaluation for John Fargo, period of observation December 18, 1981, from 9:30 to 10 o'clock, school year 1981-82 (2 pages)
R-13	Teacher evaluation for John Fargo, period of observation, October 20, 1981 from 10 to 10:30, school year 1981-82 (2 pages)
R-14	Teacher evaluation for John Fargo, period of observation, March 17, 1982, from 1:30 to 2 o'clock,

		school year 1981-82 (2 pages)
	R-15	Teacher evaluation for John Fargo, period of observation, December 6, 1982, from 9:30 to 10 o'clock, school year 1982-83 (2 pages)
	R-16	Teacher evaluation for John Fargo, period of observation, March 7, 1983, from 1:20 to 1:50, school year 1982-83 (2 pages)
	R-17	Evaluation of John Fargo, dated October 25, 1982
	R-18	Teacher evaluation for John Fargo, period of observation, October 8, 1982, from 12:45 to 1:15, school year 1982-83 (2 pages)
	R-19	Teacher evaluation for John Fargo, date of observation, March 15, 1984 from 9 to 9:45, school year 1983-84 (2 pages)
	R-20	Teacher evaluation for John Fargo, period of observation, March 12, 1985 from 10:30 to 11:20, school year 1984-85 (2 pages)
	R-21	Teacher evaluation for John Fargo, period of observation, February 5, 1986 from 10:30 to 11:20, school year 1985-86 (2 pages)
	R-22	Teacher evaluation for John Fargo, period of observation, March 5, 1987 from 8:48 to 9:30, school year 1986-87 (2 pages)
	R-23	Picture of R.R., K.B. and D.H.
	R-24	Picture of Fargo's desk, Room 313A
	R-25	Picture of three tables in Fargo's room and door and blackboard in Fargo's room
	R-26	Picture of three tables in Fargo's room

R-27	Disciplinary referral for D.P., dated December 3, 1987
R-28	Psychological evaluation for J.B. by Katherine Killeen, dated April 30, 1987 (3 pages)
R-29	Educational evaluation for J.B., dated April 29, 1987 by Veronica Madigan (3 pages)
R-30	Psychological evaluation for B.M. by Katherine Killeen, dated March 13, 1987 (3 pages)
R-31	Report of social and adaptive behavior assessment for B.M. by Lynne W. Palmer, dated February 5, 1987 (3 pages)
R-32	Psychological evaluation for D.P. by Katherine Killeen, dated May 19, 1987 (3 pages)
R-33	Educational evaluation of D.P. by Veronica Madigan, dated May 27, 1987 (3 pages)
R-34	Report of social and adaptive behavior assessment for D.P. by Lynne W. Palmer, dated May 29, 1987 (3 pages)
R-35	Identification
R-36	Identification
R-37	Identification
R-38	Identification
R-39	Identification

C E R T I F I C A T E

I, TALIAH J. HAMEED, a Certified Shorthand Reporter and Notary Public of the State of New Jersey, do hereby certify that the foregoing is a true and accurate transcript of my stenographic notes of the within proceedings, to the best of my ability.

TALIAH J. HAMEED, C.S.R.
License No. XI01565

IN THE MATTER OF THE TENURE	:	
HEARING OF JOHN FARGO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE BOROUGH OF	:	DECISION
NORTH ARLINGTON, BERGEN COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Respondent was granted an extension until December 15, 1989 to file exceptions to the initial decision. His exceptions were timely filed on that date. The Board's reply thereto was timely filed as well. On December 22 respondent telefaxed a letter to the Commissioner which he avers "supplements" his exceptions and objections to the initial decision. This submission was deemed an untimely filing under the provisions of N.J.A.C. 1:1-18.4 and therefore not considered by the Commissioner.

Respondent avers that the initial decision should be rejected because the ALJ found the classified students' stories credible despite their biases and inconsistencies. He also contends she totally disregarded the reasonable, credible and relevant evidence of school officials directly contradicting the children's testimony and found that his acknowledgement that he touched the students' shoulders or knees to get their attention supported a finding of sexual impropriety. As to this, respondent avers that the ALJ reached her improper decision solely on the basis of her own biases as opposed to the evidence.

Respondent's specific exceptions initially reiterate 384 proposed findings of fact as submitted to the ALJ (Respondent's Exceptions, pages 3-52) which are herein incorporated by reference and have been carefully considered by the Commissioner. It is respondent's position that the failure to find all of those proposed findings (PF) which are cited to the record requires reversal. As to this, he argues, inter alia, that the ALJ failed to address what he deems to be the particularly insightful facts regarding the neurological and perceptual impairments of the students. (PF Nos. 44-47) He also avers that the ALJ erred in not adopting his proposed findings which support that B.M. is of low average intelligence, not average intelligence as found by the ALJ, and that he had a strong dislike for school and an attitude problem. (PF Nos. 51-53, Exhibit R-30).

Respondent contends that B.M.'s "antics" of January 14, 1988 and his allegations can only be understood within the context of his proposed factual findings (PF Nos. 75-254) which he avers demonstrate the non-credibility of the classified students and Fargo's credibility and the rest of the teachers at North Arlington High School. He characterizes B.M.'s story as preposterous and

belied by numerous inconsistencies and believes it significant that B.M.'s girlfriend never testified to the event about his purported grabbing of B.M.'s "butt." He also points out that (1) prior to B.M. saying he was going to get him in trouble, B.M. never made any allegations to school officials about any alleged abuses and (2) contrary to B.M.'s assertion that he told Mr. Tortora of alleged improprieties, Mr. Tortora categorically denied this. (Respondent's Exceptions, at p. 54)

As to the allegation made by D.P., respondent excepts to the omission of the substance of his proposed findings Nos. 179 to 254 averring that although a few facts were considered by the ALJ, some of his inconsistent and contradictory statements were not. Further, the ALJ did not consider that D.P. never told his therapist of the alleged incidents or that he had a bad attitude towards school.

As to J.B., it is respondent's position that while the ALJ properly found that J.B. did not discuss the alleged hallway incident with Mr. Ferguson, she nonetheless did not address the fact that he never discussed it with anyone at all at school. Respondent also avers that (1) the ALJ incorrectly found that J.B. believed he told his mother of the slapping incident when in actuality the transcript reveals he responded "I think so, I'm not sure" (6T12-5 to 10) and (2) the ALJ should have also made the following findings of fact:

> 268. [J.B.] claimed that Mr. Fargo threatened [J.B.] that if he didn't sit very close next to him, he would give him a bad grade. [J.B] pulled his chair away because he was afraid of him and did not want to sit close. (6T13-21 to 14-4)
>
> 270. [J.B.] claimed that he doesn't remember when he confronted Mr. Fargo about a grade that he received or whether he put Mr. Fargo against the locker because of a grade. (6T25-15 to 25)
>
> 271. [J.B.] claimed that when he was going to the Prosecutor's Office and after Mr. Ferguson said to tell the truth, [J.B] stated that there was some kind of grabbing on [J.'s] part, because Mr. Fargo had cursed at him or about him. (1T34-11 to 18) (Id., at p. 55)

Respondent also avers that given his proposed findings Nos. 274-288, the ALJ should have found the testimony of K.B. and R.R. not credible. Moreover, she should have adopted proposed findings Nos. 289, 290, and 293-298, as they affect credibility.

As to S.S.'s testimony, respondent maintains that his proposed findings Nos. 299-347 present a more revealing description of that student than that "alluded to by the ALJ" (Id., at p. 57), particularly that he was a good friend of B.M. (4T83-25 to 84-4; 4T84-25 to 85-1). More specifically, respondent avers that S.S.'s observations of various incidents contained many inconsistencies which demonstrate their incredibility, i.e.:

> ***The ALJ noted that [S.S.] alleged that there had been a shoving match between Mr. Fargo and [J.B.]. Although [J.B.] claimed it occurred as a result of a sexual comment to which he took offense, [S.S.] testified that there was not a sexual comment. This discrepancy, as well as others, are (sic) documented in the Initial Decision. However, the Initial Decision should have included the fact that:
>
> > "336. Although 'close, good friends,' [S.S.] never discussed with [J.B.] what the dispute was about. At his deposition, however, [S.S.] said that after the incident [J.B.] told him that the fight was about the test grade. (4T89-4 to 13; 6T2-2 to 10)
> >
> > 347. [S.S.] never reported any incidents to teachers or parents and never reported or requested to be transferred from the class. (4T100-14 to 101)" (Id.)

As to the ALJ's findings with respect to B.M.'s allegation that he told Mr. Tortora about respondent's alleged improprieties, he contends that:

> The ALJ properly found that B.M. never told Mr. Tortora about Mr. Fargo's alleged improprieties. The ALJ adopted Mr. Fargo's Proposed Facts 59 and parts of 65 and 68, but did not adopt all of the relevant facts, as set forth in Mr. Fargo's Proposed Facts, Nos. 54 and 72. These facts demonstrate that Mr. Tortora has been a teacher of the handicapped for 10 years, was a detective on the Bergen County Sheriffs Department for 21 years prior to teaching, and has no biases in favor of Mr. Fargo or [B.M.]. The facts further show that [B.M.] had no discussions with Mr. Tortora regarding Mr. Fargo except as related to work load. Furthermore, Mr. Tortora, being a teacher and former detective, would have reported the sexual allegations, especially since the failure to report the allegations would violate school procedure and would result in action being taken against him. Thus, Proposed Facts Nos. 65 to 74 belie [B.M.]'s testimony as to who was told about these alleged incidents and when they were told. (Id., at pp. 57-58)

In addition to the above, respondent excepts to the ALJ's failure (1) to be more expansive about his solid reputation as a good, conscientious and effective teacher; (2) to include all pertinent facts about his classroom and the issue of cursing. (Id., at pp. 58-61)

Respondent also argues that the initial decision should be reversed because the ALJ rejected the sufficient, competent and credible evidence. Of this respondent avers:

> In the instant case, it is clear that the Board has failed to present any credible evidence to support its spurious claims. As made clear by the detailed proposed findings of fact, (which are supported by the record), the classified students' constantly changing allegations conflict with their prior versions and the versions of other students. The preposterous allegations of the students that numerous school officials and teachers were idly sitting by while witnessing physical assaults or learning of sexual allegations involving Mr. Fargo and students is patently absurd and exceeds the upper-most limits of a good faith.
>
> The allegations, which constitute a shot-gun approach at Mr. Fargo, are clearly spurious. The uncontested facts and the ALJ's finding (Initial Decision, at p. 19, para. 27) demonstrate that Mr. Fargo was a concerned, highly respected and productive teacher, who managed to motivate his class of classified students. Mr. Fargo, was highly respected for his teaching abilities and was concerned enough about his students to: (a) give a troubled youth a T-shirt to cheer him up and alleviate the student's concerns of over perspiration, and (b) give two students rides to their houses, during bad weather or when he was passing their way. Clearly, this Commission should dismiss the charges--all of which are unfounded--against Mr. Fargo.
>
> Indeed, the ALJ and the Board recognize that the allegations made by the students are incredible. No other reason could explain why the Board has not brought charges against Mr. Ferguson, Mr. Ehrlich, Mr. Tortora and Ms. Glowack for acting improperly by failing to notify the proper authorities of fights occurring in their presence and allegations made to them of sexual misconduct by Mr. Fargo with his students. Indeed, the preposterous allegations of [K.B.], [R.R.] and [S.S.] were summarily rejected by the Board and Mr. Fargo was not charged with midconduct as to them. Having recognized the fantasy life of these classified students, and properly concluded not to charge the other teachers, the Board should never have brought charges against Mr. Fargo. The Commission should, therefore, dismiss all charges which are false in one and false in all.

> Assuming arguendo that this Commission were to find that one of the shotgun allegations had merit, namely that: Mr. Fargo somehow acted improperly attempting to instruct his class not to use profanity in the classroom, any penalty imposed should be de minimis. After all, there was no school policy on the issue and Mr. Fargo had to culturize students, who admittedly used profanity in the classroom and found profanity in their school textbooks. Although we submit that this Court should not substitute its belief on how to handle the issue for that of the discretion/judgment exercised by a trained teacher, assuming arguendo that this Commission believes that a different method should have been utilized, no sanction should be imposed. Certainly, dismissal from a tenured teaching position is unwarranted. After all, Mr. Fargo's method of teaching was a reasonable exercise of discretion.
>
> For the forgoing reasons, the Commission should dismiss all the allegations. The Commission should also restore Mr. Fargo to his tenured position and award him the compensation denied during the 120 days subsequent to the filing of the formal charges against him. (Id., at 63-65)

Respondent next raises in his exceptions an argument that the Commissioner should reject the initial decision because it was made by an ALJ who should have recused herself. He alleges that the ALJ rendered her decision based upon personal biases and her own pending lawsuit alleging sex discrimination. She is characterized by respondent as failing to disclose this lawsuit pending now and at the time of hearing and as having refused to provide details of her lawsuit when his counsel requested information when he became aware of said suit after the hearing had been conducted. (Id., at p. 66)

More specifically, respondent argues that recusal was proper pursuant to R. 1:12-1, N.J.A.C. 1:1-14.12, and Code of Judicial Conduct Canon 3, all of which make it clear that a judge should avoid the appearance of impropriety and not judge matters in which they have a personal bias or prejudice. R. 1:12-1 provides that:

> The judge of any court shall disqualify himself on his own motion and shall not sit in any matter***
>
> (f) when there is any other reason which might preclude a fair and unbiased hearing and judgment, or which might reasonably lead counsel or the parties to believe so.

N.J.A.C. 1:1-14.12 provides that:

(a) A judge shall, on his or her own motion, withdraw from participation in any proceeding in which the judge's ability to provide fair and impartial hearing might reasonably be questioned, including but not limited to instances where the judge:

***

8. When there is any other reason which might preclude a fair and unbiased hearing and decision, or which might reasonably lead the parties or their representatives to believe so.
(Id., at pp. 66-67)

With respect to this recusal issue, respondent urges that:

The instant ALJ has a matter pending in United States District Court, District Court of New Jersey, Civil Action No. 88-1373(NHP). In the complaint, she accuses her employer of sexual discrimination, sexual harassments, and tortious conduct.*** Despite this complaint, the ALJ did not disqualify herself from the Fargo case, a matter that likewise involves sexual impropriety. She did not even raise the issue of her involvement at the hearing so that the attorneys could decide whether to pursue the matter of recusal. Furthermore, even now the ALJ refuses to disclose information about the case to the attorney for petitioner.***

The ALJ's apparently strong identification with the allegedly abused "victims" to the exclusion of record and reason, demonstrates that she was impartial (sic).

Recent Statements of the Supreme Court and other Courts demonstrate the necessity for recusal by judges in cases similar to those cases in which the judge has a personal involvement. Most recently, on October 23, 1989, Associate Justice Clifford stated that at least for the period of suspension of his driving privileges, he would not participate in any appeal in the Supreme Court involving charges of driving-while-intoxicated or related thereto.***

On November 10, 1987, Supreme Court Chief Justice Robert N. Wilenz stated that the Honorable Donald G. Collester, Jr. (the Presiding Judge, the Criminal Division in Morris County), had been convicted of drunk-driving.*** Therefore, Judge Collester would not preside in drunk-driving cases on wrongful death by auto cases.***

> An alleged victim of sexual improprieties is all the more affected by her case and should, therefore, be disqualified from sitting on cases involving sexual impropriety. See Johnson v. Salem Corp., 189 N.J. Super. 50, 61 (App. Div. 1983), aff'd. 97 N.J. 78 (1984) ("[there] may be a specific situation which would render it appropriate for a judge to recuse himself in a particular case.")
>
> Because the ALJ was partial, she rejected the evidence and found Mr. Fargo guilty. The Commissioner should reject her biased findings set forth in the tainted Initial Decision and restore Mr. Fargo to his tenured position.
>
> (Id., at pp. 67-68)

Respondent further argues that assuming arguendo the need to supplement the record, the Commissioner should grant his motion to supplement the record to include the documents demonstrating the ALJ's bias.

Lastly, respondent urges that assuming arguendo he has not prevailed under the preponderance of evidence standard, the Commissioner should exonerate him either under the applicable heightened standard involving moral turpitude or the clear and convincing standard.

* * * *

The Commissioner has conducted his own detailed and exhaustive examination of the entire record in this matter including the transcripts of the hearing. He will first address the issue of recusal of the ALJ which is not addressed in the initial decision.

The record as transmitted to the Commissioner by the Office of Administrative Law contains a letter of October 12, 1989 from respondent's attorney which requests that the ALJ indicate to him in writing the circumstances of her case pending in U.S. District Court which, he has been informed, involves sexual harassment/discrimination. Mr. Dratch indicated in the letter that if the ALJ were involved in such a matter, he believes it highly inappropriate for her to rule in this matter. The record also contains another letter from Mr. Dratch, dated November 3, 1989, asking the ALJ to respond to the earlier letter. This is followed by a November 8, 1989 letter to Mr. Dratch from the ALJ, which, inter alia, acknowledges his request and states that (1) the U.S. District Court case is a matter of public record and (2) as it has nothing to do with the Fargo case, his request is improper.

As a result of the recusal issue being raised in respondent's exceptions, the Director of the Office of Administrative Law (Director) issued an Order dated December 21, 1989 which is summarized below.

The Director first points to the fact that questions regarding recusal of ALJ's are subject to her review. N.J.A.C. 1:1-3.2(c) and 1:1-14.10(k)-(m) Issues of recusal are required to be reviewed on an interlocutory basis and may not be sought after the judge renders the initial decision in a contested case. N.J.A.C. 1:1-14.10 As such, the Director ruled the request for review is out of time as it was made after the initial decision was rendered. She states:

> It is generally accepted that request for recusal must be timely raised and, if not, the right is waived. The rule was stated in Marcus v. Director, Office of Workers' Comp. Prog., 548 F 2d 1044, 1051 (D.C. Cir. 1976):
>
> > The general rule governing disqualification, normally applicable to the federal judiciary and administrative agencies alike, required that such a claim be raised as soon as practicable after a party has reasonable cause to believe that grounds for disqualification exist. It will not do for a claimant to suppress his misgivings while waiting anxiously to see whether the decision goes in his favor. A contrary rule would only countenance and encourage unacceptable inefficiency in the administrative process.
>
> For the same reasons expressed in Marcus, the Uniform Administrative Procedure Rules require that a motion or recusal must be made expeditiously and that appeals must be taken interlocutorily. A party should not be able to attempt to use a recusal motion to reverse an unfavorable decision. Equally important disqualification challenges should be decided before trial to avoid the necessity for retrials. (at p. 2)

Moreover, the Director ruled that regardless of the merits of the substantive arguments in favor of recusal no need for a new hearing is preceived as necessary because:

1. While Mr. Fargo objects to the ALJ's conclusions, claiming they were influenced by her alleged bias, he does not complain that the record is not fully developed;

2. There is no allegation that the ALJ prevented the building of the record, only that she drew the wrong conclusions;

3. The fact that the Commissioner will review the complete record and render a final

decision in the matter cures any possible defect in the hearing if assuming arguendo, the ALJ should have recused herself in the first instance; and

4. There has been no allegation of bias on the part of the Commissioner of Education.

Upon review of the recusal arguments advanced by respondent and the OAL Director's Order, the Commissioner determines that he has no jurisdiction to rule on it as the authority to review an ALJ's disposition of recusal rests with the Director of the Office of Administrative Law. Notwithstanding this determination, he is in argeement with the Director that because the Commissioner conducts his own independent review of the complete record and renders his own determination in the matter, and given that respondent makes no specific allegations of bias in her conduct of the hearing and the building of the record, there is no reason for the Commissioner not to proceed with his decision in the matter.

The second issue to be addressed is the burden of proof standard applied by the ALJ. The Commissioner is unpersuaded by respondent's legal arguments that the ALJ erred in applying a preponderance of credible evidence standard rather than a heightened standard of preponderance because the case involves moral turpitude or a clear and convincing standard. In addition to the Portia Williams matter cited by the ALJ with respect to the burden of proof in tenure matters, the Commissioner, the State Board and the New Jersey Appellate Court have addressed said burden. See In the Matter of the Tenure Hearing of Arlene Dusel, School District of the Borough of Sayreville, 1978 S.L.D. 526, 529, aff'd State Board 1979 S.L.D. 155 and In the Matter of the Tenure Hearing of Barry Deetz, School District of the Village of Ridgewood, 1984 S.L.D. 1923, aff'd N.J. Superior Court, Appellate Division, May 10, 1985 (A-1264-84T5), Cert. den. 101 N.J. 321 (1985). In each instance, preponderance of credible evidence was found to be the appropriate standard.

As to the review of the record with respect to the tenure charges themselves, the Commissioner is ever mindful of the fact as set forth by the State Board in In re Deetz, supra, that there is a responsibility to assure that the decision is supported by a preponderance of credible evidence, particularly as this matter in great part depends on the testimony of teenaged students. The State Board expressed in Deetz that:

> Although we recognize that corroboration of student testimony is not required, it has long been established that student testimony must be examined with great caution. See, e.g. In the Matter of the Tenure Hearing of Portia Williams, decided by the Commissioner August 27, 1981, aff'd State Board March 24, 1982, aff'd Docket No. A-4036-81T3 (App. Div., Dec. 15, 1982). While this stricture generally has been applied where the students were under ten years old, see Portia Williams, supra, at 8, the same caution has been used in evaluating the testimony of

teenagers. See In the Matter of the Tenure Hearing of Nathan James Michaels, decided by the Commissioner January 30, 1984, aff'd State Board September 5, 1984. (at 1926)

Moreover, the Commissioner is fully cognizant of the fact that he may make his own independent findings of fact, although due consideration must be given to the opportunity of the ALJ to observe the parties and their witnesses.

As to the first four charges against respondent with respect to improprieties toward B.M. (allegations a-d, Initial Decision, at p. 6), the Commissioner adopts the findings and conclusions of the ALJ as to respondent's guilt with regard to those charges. In reaching this determination, the Commissioner has undertaken intensive scrutiny of the transcripts of witnesses' testimony, as well as respondent's highly detailed exceptions. While there are clearly inconsistencies in the testimony of B.M. and other witnesses, both students and staff, and while it is recongized that B.M. had animosity and anger toward respondent, the evidence is nonetheless sufficient to meet the preponderance of credible evidence standard necessary to support these charges. Even if one were to discredit the testimony of D.P., B.M.'s close friend, the testimony of B.M.'s mother is corroborative and credible as is that of student S.S. who observed the touching of B.M.'s penis by respondent.

As to the charges relating to D.P., (allegations e-j, Initial Decision, at pp. 6-7) the Commissioner is mindful of the fact that no corroborative testimony was advanced by the Board. While not required, it made the review of his testimony a particularly cautious and painstaking one. As a result of this review, the Commissioner adopts as his own the ALJ's findings and conclusions as to the touching and rubbing of D.P.'s leg and inner thigh (allegation e) and the touching of the penis through the clothing two times with the eraser end of a pencil (allegation f). His testimony was credible and convincing as to both. However, insofar as allegation h is concerned, the Commissioner does not accept the ALJ's finding and conclusion with respect to two incidents of respondent grabbing D.P.'s buttocks, one of which allegedly resulted in D.P.'s forcibly repelling respondent by throwing him to the floor. Such rejection is based on the fact that this latter incident was alleged to have occurred in the presence of other students and at least one teacher Ms. Glowacki; yet no corroborative testimony for such a highly visible incident was brought forth. By D.P.'s own testimony he does not remember the other alleged buttock incident. (4T42-43)

The Commissioner likewise does not accept the ALJ's findings and conclusion with respect to the "Jingle Bells" episode (allegation i). According to D.P.'s testimony, the other students in the class witnessed the incident and he specifically names those students. (4T40) Only one of the students testified, C.D., and no corroborative testimony was brought forth on the allegation by him. Given the open visibility within which this episode was supposed to have occurred, it stretches the imagination that C.D. had no

testimony to offer on the incident*; therefore, that particular charge is dismissed.

As to allegation j, the making of inappropriate and indecent remarks to D.P. on several occasions between September 1987 and January 26, 1988 and allegation k which alleges improper, indecent, sexually provocative and profane language in class, the Commissioner accepts the ALJ's findings and conclusions but notes that testimony of student witnesses was essentially consistent that respondent's use of such language and comments was usually a response or retort to something prompted by a student and not initiated by him. While this does not lessen the seriousness of the charge in terms of assessing his fitness as a role model, it nonetheless bears mentioning. Moreover, the Commissioner agrees with the ALJ that respondent's profanity reduction explanation is not credible.

Allegation l charges that respondent hit the buttocks of C.D. The Commissioner accepts the ALJ's finding and conclusion crediting C.D.'s testimony as to this charge. His testimony was forthright and convincing.

The charges with respect to respondent's improprieties toward J.B. have been thoroughly examined to assess if the record provides a preponderance of credible evidence to support them. His testimony with respect to the knee touching (allegation n) is consistent with the testimony of all the male students. Allegation m charges respondent approached J.B. in the school hallway and made an indecent remark to him about his mother, i.e., "have fun with your mom last night screwing her," so upsetting J.B. that he pushed respondent against a locker. Corroborative testimony as to respondent being pushed against a locker by J.B. came from S.S., although his account varies from J.B. in terms of how the incident was triggered. S.S. assumed the incident to have been triggered by a test grade (4T72, 85, 94). He did testify that he did not hear anything sexual or any reference to J.B.'s mother (4T87-88) but he also testified that he did not hear anything directly (4T94) B.M. also testified that he observed J.B. pick respondent up and shove him against the locker but that he never learned why. (3T20-21) Having carefully weighed the testimony on this charge, the Commissioner accepts the findings and conclusions of the ALJ which accepted J.B.'s credibility as it was corroborated at least in part by S.S., a highly credible witness, and by B.M. as to the physical confrontation at the locker, an action for which J.B. was never disciplined by respondent. J.B.'s testimony with respect to allegation o is likewise found credible, i.e., that respondent said to him "Did you screw your girlfriend last night?"

Upon a thorough and intensive examination of the record, the Commissioner adopts as his own the ALJ's findings and conclusions with respect to allegations p to r as they are supported

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* It is noted for the record that the student testimony was sequestered.

by a preponderance of the credible evidence. Careful scrutiny of respondent's 384 proposed findings of fact, the documentary evidence, and transcripts does not alter the inexorable conclusions to be drawn from the record as a whole. These findings and conclusions are:

> ***
>
> 15. Between September 1987 and January 26, 1988, John Fargo has engaged in an established sexually abusive practice of touching the knees, inner thighs, buttocks, and genital area of male students.
>
> 16. Between September 1987 and January 26, 1988, John Fargo has engaged in a pattern of the use of highly inappropriate, sexually provocative and profane language in classrooms in the presence of classified students.
>
> 17. Between September 1987 and January 26, 1988, John Fargo by and through his conduct and actions as referred to herein, and otherwise as established through statements made by students formerly in his classes, established an inappropriate atmosphere in his classroom, of fear, harassment, uneasiness and uncomfortable- ness to the detriment of all students, manifesting itself in the unwillingness and refusal of students to appear after class.
>
> (Initial Decision, at pp. 95-96)

The Commissioner notes that the record contains certain child study team reports for three students, B.M., D.P., and J.B. (Exhibits R-28-32) In accordance with the provisions of N.J.A.C. 6:3-2.5 the only way that those reports could be introduced to the record in this matter is by parental consent (N.J.A.C. 6:3-2.5 (c)11) or by presentation of a court order (N.J.A.C. 6:3-2.5(c)12). In the instant matter only one parental consent is contained in the record, B.M.'s. There is a letter from respondent's attorney to the ALJ dated February 22, 1989 which states that the consent for J.B.'s parents is enclosed. However, the enclosure does not contain a consent signature from either of J.B.'s parents. Further, that letter makes reference to the failure of D.P.'s parents to consent. This is followed up by a letter from respondent's attorney to D.P.'s parents dated March 1, 1989 that informs them that a hearing was scheduled on March 14, 1989 before the ALJ to hear their objections. It also informs them that if they do not appear, the court may grant respondent's request for disclosure of the child study team records.

The record does not explain precisely how the child study team reports for D.P. were placed in the record without a court order. Under the ruling of the New Jersey Superior Court Appellate Division in In the Matter of the Tenure Hearing of Lynn Jenisch Tyler, School District of Sussex-Wantage Regional, Sussex County,

(A-2082-88T1, November 6, 1989), however, an ALJ does not have the power to order release of a pupil record as the Office of Administrative Law is not a court.

Therefore, the Commissioner has limited his review to the child study team reports of B.M. (R-30 and 31). As to these records, the Commissioner would like to initially state that he finds unpersuasive respondent's obvious position that the testimony of classified students is somehow more suspect because of their educational handicapping conditions. Nonetheless, B.M.'s child study team reports were examined and given careful consideration. Their contents did not alter the Commissioner's conclusions contained herein as they failed to reveal any information demonstrating that B.M. would be precluded from being a credible witness.

Given the inclusion in the record of child study team reports for three students, whose names appear throughout said reports and for whom there is only one parental consent, and given the fact that somehow the Division of Youth and Family Services (DYFS) report is contained in the record contrary to N.J.S.A. 9:6-8.10a, the Commissioner orders that the record in this matter be sealed from public review. The Commissioner also states for the record that the DYFS report was not reviewed due to its improper presence in the record.

Lastly, the Commissioner has reviewed the decision on motion issued by the ALJ on December 23, 1988 with respect to respondent's claim the the petition should be dismissed due to the Commissioner's failure to conduct a hearing within the time limitations contained in N.J.S.A. 18A:6-11. He finds the ALJ's analysis well-reasoned and conclusions legally correct as to the directory and not mandatory nature of the time limits for hearings. The Order of December 23, 1988 is therefore adopted by the Commissioner for the reasons stated therein.

Accordingly, the Commissioner adopts the initial decision except as modified herein. Those modifications do not, however, warrant alteration of the penalty of dismissal to be levied in this matter. All but three of the charges against respondent (allegations g, h, and i) have been sustained and clearly warrant dismissal. The record supports by a preponderance of credible evidence that respondent is unfit to teach. Consequently, respondent is dismissed from his tenured teaching position as of the date of this decision.

A copy of this decision shall be forwarded to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.7(b) for its consideration.

COMMISSIONER OF EDUCATION

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 5548-88
AGENCY DKT. NO. 220-7/88

PETER NAZARECHUK & JAMES CANCIALOSI,
Petitioners,
v.
BOARD OF EDUCATION OF THE BOROUGH OF NORTH CALDWELL, ESSEX COUNTY,
Respondent.

Paul Kleinbaum, Esq., for petitioners
(Zazzali, Zazzali, Fagella & Nowak, attorneys)

James Rothschild, Esq., for respondent
(Riker, Danzig, Scherer, Hyland, & Perretti, attorneys)

Record Closed: November 15, 1989 Decided: December 15, 1989

BEFORE **OLIVER B. QUINN, ALJ:**

Petitioners, both tenured teachers employed by the North Caldwell Board of Education ("Board"), allege that the Board's actions, reducing petitioner Nazarechuk's schedule and salary and transferring petitioner Cancialosi, violated the Open Public

Meetings Act's notice provisions, N.J.S.A. 10:4-6 et seq. Petitioner Nazarechuk also alleges violations of his tenure and seniority rights by the Board's refusing to assign him to teach a family life course while permitting teachers without tenure, or with less seniority than him, to teach family life.

Respondent counterclaims that petitioner Nazarechuk attempted to "coerce and blackmail" the Board of Education into restoring him to full time schedule and salary. Respondent denies any violation of the Open Public Meetings Act, and contends that tenure and seniority rights are not applicable to family life curricula.

PROCEDURAL HISTORY

The original petition in this matter was filed with the Commissioner of Education on July 11, 1988. On July 21, 1988, respondent filed an answer and a counter-petition against petitioner Nazarechuk. The matter was transmitted to the Office of Administrative Law (OAL) on July 27, 1988 for determination as a contested case pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq.

An amended petition was filed on September 19, 1988.

A telephone prehearing conference was held on October 3, 1988, and a prehearing order was issued which set down a December 19, 1988 hearing date. That hearing was adjourned because the parties indicated that they were pursuing settlement.

On October 20, 1988, petitioner Nazarechuk filed a motion for summary decision dismissing respondent's counter-petition. On January 19, 1989, an Order granting petitioner Nazarechuk's motion for summary decision was issued. A copy of that Order is attached to this decision.

A telephone prehearing conference was held on March 3, 1989, during which the parties indicated that no settlement had been reached. A hearing was scheduled for May 3, 1989 for the limited purpose of taking testimony on the factual issue of the notice petitioners received of the Board meetings at which their employment was discussed. The parties agreed that all other issues would be decided on stipulations of facts and briefs.

A second amended petition was filed on March 3, 1989 and an answer to it was filed on March 10, 1989.

On April 28, 1989, the parties filed a stipulation of the facts that were to be the subject of the May 3, 1989 hearing, and that hearing was cancelled.

On November 15, 1989, the parties filed a stipulation of facts regarding the district's family life curriculum. The record was closed on that date.

FACTS

I **FIND** the following facts, which have been stipulated by the parties:

1. On April 25, 1988, the Superintendent of the North Caldwell Schools, Dr. Sharon Clover, advised petitioner Nazarechuk that the Board of Education would be considering a recommendation that Nazarechuk's position as a physical education instructor be reduced due to the declining enrollments at the North Caldwell Schools.

2. The date for the Board's action on the recommended reduction was not specifically addressed in the meeting of April 25 between Dr. Clover and Nazarechuk. However, general notices of a Board of Education meeting were posted at the North Caldwell Schools in advance of the April 26, 1988 Board meeting. There is no stipulation as to whether Nazarechuk received actual notice that the Board of Education would

be considering his reduction at the April 26, 1988 meeting.

3. A public meeting of the Board was held on April 26, 1988. The items for discussion at that meeting included the proposed assignments of teachers for the coming 1988-1989 school year. One of those recommended assignments was the assignment of Nazarechuk to a three-fifths position, which constituted a reduction in his position. The Board passed a resolution at its public meeting on April 26, 1988, reducing Nazarechuk to a three-fifths position. Nazarechuk was not present at this meeting.

4. At its May 24, 1988 meeting, the Board passed a resolution transferring petitioner Cancialosi from the Gould School to the Grandview School. Petitioner Cancialosi's principal, Mr. Venezia, advised Mr. Cancialosi on May 24, 1988 at approximately 3:30 p.m. only that his transfer would be taken up by the Board at its meeting that night but not that he was entitled to attend the meeting and request public discussion of the transfer. Petitioner Cancialosi attended the Board meeting.

5. By letters dated August 4, 1988, the Board advised Nazarechuk and Cancialosi that it would discuss their assignments for the 1988-1989 school year at its regular meeting on August 9, 1988. Copies of those letters are attached as Exhibit A.

6. On August 9, 1988 at a public meeting, the Board again passed a resolution that Nazarechuk's position should be a three-fifths position. Nazarechuk was present at this meeting. The Board also again resolved at this meeting that Cancialosi, who did not attend, should be transferred to the Grandview School.

7. By letters dated November 18, 1988, the Board advised Nazarechuk and Cancialosi that their assignments would again be considered at a public meeting of the Board on November 22, 1988. Copies of those letters are attached as Exhibit B.

8. At a public meeting on November 22, 1988, the Board passed a third resolution that Nazarechuk's position should be a three-fifths position, and a third resolution that Cancialosi should be transferred.

9. The family life material taught to the sixth grade at the North Caldwell School District is integrated into the science curriculum. The family life material is taught during regularly scheduled sixth grade science classes. There is no separate "family life" class or course for the sixth grade.

10. The family life material is also taught on an ad hoc, unstructured basis throughout the school system in any grade, class or curriculum if need arises. However, there are no separate family life classes or courses in any grade.

ISSUE

1. Was there a violation of the Open Public Meetings Act, N.J.S.A. 10:4-6 et seq.? More specifically: (a) were petitioners given notice of the Board of Education meetings at which their employment statuses would be discussed; and (b) did N.J.S.A. 10:4-6 et seq. give petitioners a right to have their employment statuses discussed in private sessions with their participation?

2. Did respondent violate petitioner Nazarechuk's tenure and/or seniority rights by utilizing teachers with less seniority to teach family life following petitioner's reduction-in-force to a three-fifths position?

LEGAL ANALYSIS AND CONCLUSIONS

For the reasons stated herein, respondent's motions for summary decision on both counts of the second amended petition are GRANTED.

1. Open Public Meetings Act

The Open Public Meetings Act, ("OPMA") N.J.S.A. 10:4-6 et seq., provides that, as a general rule, all meetings of public bodies must be open to the public. In enacting this "Sunshine Law," the New Jersey Legislature declared that secrecy in the management of public affairs undermines the public faith, interest and participation in government operations. N.J.S.A. 10:4-7. See also, Polillo v. Deane, 74 N.J. 562 (1977). Therefore, the public must be given advance notice of, and an opportunity to attend, meetings of a public body at which any business of the public is discussed or acted upon, except in limited circumstances.

N.J.S.A. 10:4-15(a) provides that governmental action taken in violation of the OPMA may be corrected or remedied by action de novo at a meeting held in conformity with the Act. Thus, even if a violation of the OPMA should occur, it can be corrected at a subsequent meeting. Schwartz v. Board of Education of Ridgefield, 1980 S.L.D. 310, 323 (Feb. 13, 1980), adopted, Comm'r of Ed. (March 31, 1980), rev'd, State Bd. of Ed. (Oct. 1, 1980), aff'd (N.J. App. Div., Nov. 2, 1981, A-740-80-T1).

As noted above, the OPMA lists several exceptions to the requirement that all meetings of public bodies shall be open to the public at all times. These exceptions are enumerated in N.J.S.A. 10:4-12b and include meetings involving employment issues. N.J.S.A. 10:4-12b(8) provides that:

> A public body may exclude the public only from that portion of a meeting at which the public body discusses: ... [a]ny matter involving the employment, appointment, termination of employment, terms and conditions of employment, evaluation of the performance of, promotion or disciplining of any . . . employee employed. . . by the public body, unless all the individual employees . . . whose rights could be adversely affected request in writing that such matter or matters be discussed at a public meeting.

Petitioners cite several Appellate Division decisions in support of their contention that they had a statutory right to have their employment matters considered by the Board in private, rather than public, sessions.

In Rice v. Union County Regional High School Board of Education, 155 N.J. Super. 64 (App. Div. 1977), cert. den., 76 N.J. 238 (1978), the Appellate Division determined that pursuant to the OPMA's personnel exception, a Board of Education could discuss personnel matters in private session. It further held that individual notice was required in order to consider a list of employees recommended for termination in a private, rather than public, session. In Rice, the Board of Education adopted a resolution calling for a private executive session to discuss personnel matters. The court cited the "personnel exception" and noted that the public policy behind this exception indicates "a concern for 'personal privacy or guaranteed rights of individuals which would be clearly in danger of unwarranted invasion' if these matters were to be discussed in public." Id. at 72.

The court continued, "It is clear that the sole purpose for the personnel exception is to protect individual privacy. The statute provides a method by which the individual may forego this personal privacy and have a public discussion on the matter." Ibid.

Advance notice of Board action is necessary for two purposes: (1) to decide whether a public discussion is desired; and (2) to prepare and present an appropriate written request. Id. at 73.

In Oliveri v. Carlstadt-East Rutherford Board of Education, 160 N.J. Super. 131 (App. Div. 1978), the Appellate Division concurred with the reasoning in Rice. In Oliveri,

the East Rutherford Board of Education held a nonpublic meeting at which renewal of several teachers' contracts was discussed without notice to the teachers. In addition to the nonpublic meeting, two public meetings were held by the Board. Notice of these meetings was duly published in accordance with the OPMA.

The Oliveri court held that the challenged resolution was adopted in conformity with the OPMA and that any defect was cured by adequate notice and the opportunity to request public discussion at a subsequent meeting. Thus, since each of the teachers was granted the right to a public discussion, there was adequate constructive notice. Id. at 135. Accord, Cole v. Woodcliff Lake Board of Education, 155 N.J. Super. 398, 408 (Law Div. 1978). In fact, Oliveri has been cited as authority that notice need not be actual to conform to the OPMA, but may be constructive. Jamison v. Morris School District Board of Education, 198 N.J. Super. 411, 415 (App. Div. 1985).

Although the Oliveri discussion deals primarily with the opportunity to waive private deliberation in personnel decisions and not with any requirement that such discussions be held privately, the court did point out in a footnote that "N.J.S.A. 10:4-12b(8) requires a nonpublic meeting unless all of the individual employees whose rights could be adversely affected request a public discussion in writing." (Emphasis added) Oliveri at 135. This language has not been cited in any subsequent cases.

A number of decisions rendered by Administrative Law Judges and adopted by the Commissioner of Education and the State Board of Education have distinguished the above Appellate Division decisions in cases where employment or personnel matters are discussed and acted upon without resort to executive or private sessions. In contrast to the notice required when a public body meets in private session, these decisions hold that

no individual notice is required before the public bodies can act if discussions are entirely in public. Schwartz v. Board of Education of Ridgefield, 1980 S.L.D. 310; LaFronz v. Weehawken Board of Education, 164 N.J. Super 5, 7 (App. Div. 1979), cert. denied, 79 N.J. 491 (1979).

In Schwartz, the State Board of Education, reversing both the Administrative Law Judge and the Commissioner of Education, took special note that the personnel deliberations involved took place in a regularly scheduled meeting which was included in the Board's annual schedule of meetings. The State Board said:

> The key question, therefore, is whether any further notice of that meeting or of action to be taken thereat was required to be given to Petitioner or anyone else who might be affected by the Board's reorganization of its administrative structure. The answer is clearly in the negative. N.J.S.A. 10:4-8(d) specifically provides that "where annual notice or revisions thereof in compliance with section 10:4-18 of this act sets forth the location of any meetings, no further notice shall be required for such meeting." Id. at 332-3.

See, also Crifasi v. Governing Body of Oakland, 156 N.J. Super. 182, (App. Div. 1978).

In the Initial Decision rendered in Strangia v. Board of Education of the City of Jersey City, OAL DKT. EDU 1318-83 (February 21, 1984), adopted, Comm'r of Ed. (April 9, 1984) the Administrative Law Judge reiterated the holding in Schwartz. "In brief, nothing in the transcription of the proceedings of the Board meeting...suggested the Board excluded the public from its deliberations or retired to private or executive session. As a result, the personnel exception of N.J.S.A. 10:4-12b(8) is not applicable herein. The Board's conduct of the meeting and the action terminating petitioner's position as supervisor of social studies was consistent with the Act and not violative thereof." Id. at

10. See, also, Sherman v. Board of Education of the Borough of North Plainfield, OAL DKT. EDU 5365-80, (June 25, 1981) adopted, Comm'r of Ed. (August 10, 1981) at 4; Greene v. Board of Education of the City of Perth Amboy, OAL DKT. EDU 6357-83 (April 23, 1984), adopted, Comm'r of Ed. (June 8, 1984). In fact, in Jarrett v. Board of Education of the Borough of Watchung, 1981 S.L.D. 1114 (August 20, 1981), adopted, Comm'r of Ed. (October 5, 1981), the initial decision rendered by the Administrative Law Judge states "Schwartz is controlling in this area of case law." Id. at 1119.

In case after case, Administrative Law Judges and the Commissioner of Education have declared that individual notice is not necessary where Board action took place in public. Greene v. Board of Education of the City of Perth Amboy, at 6; See, also Bott v. Board of Education of the Township of Middletown, (Commissioner's Decision, December 21, 1981, slip op. at 10); Jarrett v. Board of Education of the Borough of Watchung; Sherman v. Board of Education of the Borough of North Plainfield; Davis v. Board of Education of the Twp. of Randolph, OAL DKT. EDU 0084-83 (July 26, 1983), adopted, Comm'r of Ed. (September 12, 1983).

Furthermore, these cases distinguish themselves from Rice, since unlike the teachers in Rice, the Board action in these cases took place in a public meeting and the affected teachers were aware of the proceedings. Shafran v. Board of Education of the Township of Middletown, OAL DKT. EDU 5146-83, (April 12, 1984), adopted, Comm'r (May 31, 1984) at 23; Foster v. Board of Education of the Borough of Barrington, OAL DKT. EDU 6009-87, (May 3, 1988), adopted, Comm'r of Ed., (June 16,1988).

There is no requirement that an employee is entitled to choose whether deliberations regarding his employment will be discussed either publicly or privately. Rather, the OPMA suggests, through the use of the permissive word "may," that a board of education has the discretion to discuss personnel matters in closed session. The Appellate Division cases that have been discussed previously required that an employee must be notified if a board will discuss any employment matter in closed session, so that the employee may have the opportunity to waive his right to confidentiality and require that the matter be discussed in open session. The numerous decisions regarding deliberation of employment matters by boards of education in open session, however, hold that no individual notice is necessary. In fact, many of these decisions state that the "personnel exception" to the OPMA does not apply at all to cases where the entire discussion of an employee's status was held in open session. Strangia v. Board of Education of the City of Jersey City, at 11. Greene v. Board of Education of the City of Perth Amboy, at 6.

One recent case does combine the issues of notice and an employee's right to privacy. In Edwing v. Board of Education of the Village of Ridgefield Park, OAL DKT. EDU 1301-88 (August 8, 1988), adopted, Comm'r of Ed., (September 20, 1988) at 5, the petitioner alleged a violation of the OPMA since the Board did not allow him the opportunity to testify in private discussions. Instead, the Board chose to conduct its business in public. In his initial decision, the Administrative Law Judge distinguished Rice, citing Polillo, and stated that Rice stood for "vindication of the policy of openness which the Sunshine Law was enacted to promote." Edwing, at 5. The ALJ continued: "Policy considerations which favored the teachers in Rice cut the opposite way in this case." Ibid. Therefore, no violation of the OPMA was found.

Consequently, the factual scenario stipulated by the North Caldwell Board and the petitioners in the instant matter fits neatly into the caselaw established by Schwartz and its progeny. The North Caldwell Board did not exclude the public from its deliberations and never retired into executive session. Instead, all of the discussions relating to Nazarechuk and Cancialosi were held in public. Furthermore, both petitioners were orally notified of the deliberations to be made by the Board concerning their respective assignments and each attended at least one of the public meetings during which their employment was discussed. Thus, there was constructive notice as outlined in both the Oliveri and Jamison opinions.

Moreover, even assuming that the constructive notice was inadequate, the North Caldwell Board definitively established written notice when it sent each petitioner the letter of November 18, 1989, which explicitly explained their rights under the OPMA. Thus, even the most rigorous notice standards under the OPMA have been satisfied.

The OPMA does not establish a right to nonpublic deliberation. In fact, the recent Edwing decision stated that no violation of the OPMA occurred when an employee was denied nonpublic discussion of his employment status. Furthermore, the opinions cited by the petitioners in their letter brief-Rice, Oliveri and Polillo-have all been distinguished in cases where personnel discussions were held entirely in public.

I **CONCLUDE** that, because discussions regarding petitioners' employment were conducted entirely in public meetings, with no resort to private deliberations, individual notice was not required. Furthermore, petitioners have no statutory right to private deliberation under the OPMA.

2. Tenure/Seniority Claim to Family Life Teaching Position

Family Life Education Programs are intended to develop an understanding of "the physical, mental, emotional, social, economic and psychological aspects of interpersonal relationships; the physiological, psychological and cultural foundations of human development, sexuality and reproduction at various stages of growth; the opportunity for pupils to acquire knowledge which will support the development of responsible personal behavior, strengthen their own family life now, and aid in establishing strong family life for themselves in the future thereby contributing to the enrichment of the community." N.J.A.C. 6:29-7.1(a). The regulation authorizes teaching staff members holding one of the following certificates to teach in the family life education programs: biology; comprehensive science; elementary; health education; health and physical education; home economics; nursery; school nurse; teacher of psychology; and special education. N.J.A.C. 6:29-7.1(e).

In the instant matter, petitioner Nazarechuk held a health and physical education certification and argued that his tenure and seniority rights extended to the district's family life curriculum. However, respondent correctly argued that tenure and seniority rights do not apply to family life courses because of their interdisciplinary nature.

The determination of seniority rights is governed by N.J.A.C. 6:3-1.10 which permits the accumulation of seniority only within specific categories of certification. See, Lichtman v. Ridgewood Board of Education, 93 N.J. 362, 366 (1983). Ordinarily, a course falls within an enumerated category and seniority is readily determined between individuals holding the appropriate certification. Family life education is unique in that it

does not fall within the established categories of certifiable disciplines. Teachers holding any of 10 certificates are authorized to teach family life pursuant to N.J.A.C. 6:29-7.1(e). In Johnson v. Board of Education of the Borough of Glen Rock, Comm'r of Ed. OAL DKT. EDU 6359-83 (April 12, 1984) (May 21, 1984) a tenured home economics teacher who was reduced to 3/10ths time challenged the retention of a nontenured teacher to teach a family life course. The Commissioner affirmed the administrative law judge's determination that a local Board was not required to accommodate seniority claims in determining who would teach a family life course. See also, Bartz v. Green Brook Tp. Bd. of Ed., OAL DKT. EDU 4214-84 (April 8, 1985), Comm'r of Ed. (May 24, 1985) aff'd, State Bd. of Ed. (November 6, 1985).

In Hart v. Ridgefield Bd. of Ed., OAL DKT. EDU 5113-84 (April 10, 1985), adopted, Comm'r of Ed. (June 7, 1985), aff'd, (N.J. App. Div., Nov. 7, 1986, A-2176-85T6) (unreported), cert. den., 107 N.J. 136 (1987), the Commissioner identified the circumstance in which seniority might control a decision regarding teaching family life:

> Seniority comes into play in the assignment of family life teaching when a reduction in force occurs in a district wherein a board of education has designated a particular discipline (such as health or biology) as appropriate to teach a given level or sequence in its family life program. For example, when a reduction in force occurs in the district wherein the board has designated that specific portions of the family life education program at the secondary level are to be taught by an individual with a biology endorsement, seniority would come into play in determining which biology teacher is to be assigned. Seniority would not come into play in terms of the board being compelled to assign a teacher with home economics to any portion of its family life program it has designated to be taught by a teacher with biology endorsement merely because N.J.A.C. 6:29-7.1 permits individuals with home economics endorsements to teach in the family life program. (Commissioner's Decision at pp. 14-15)

Petitioner's reliance on two significant tenure cases is inapposite. In the first case, Capodilupo v. West Orange Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987), the Appellate Division held that a tenured teacher "is entitled to retention as against a non-tenured teacher under the tenure law," Id. at 515. In Bednar v. Westwood Board of Education, 221 N.J. Super. 239 (App. Div. 1987), the Appellate Division held that tenure rights applied to all subjects within the scope of the tenured teacher's endorsements. However, I agree with respondent's argument that neither Capodilupo nor Bednar apply in the instant matter. Both cases resolved disputes arising in categories in which the petitioner could accrue seniority pursuant to N.J.A.C. 6:3-1.10. Family life is not such a category.

N.J.A.C. 6:3-1.10 limits seniority to specific categories. Family life education is not one of the specified categories. Therefore, I **CONCLUDE** that a tenured teacher cannot acquire seniority as a family life teacher even though the tenured teacher's certification may authorize the teaching of family life.

ORDER

It is **ORDERED** that the Board's actions in reducing petitioner Nazarechuk to a three-fifths position, and in transferring petitioner Cancialosi to another school, are affirmed. It is further **ORDERED** that respondent's motions to dismiss both counts of the second amended petition are **GRANTED**, and the petition is dismissed.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

December 15, 1989
DATE

Oliver B. Quinn
OLIVER B. QUINN, ALJ

Receipt Acknowledged:

Dec. 19, 1989
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 19 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

vcb

PETER NAZARECHUK AND JAMES CANCIALOSI,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF NORTH CALDWELL, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful review, the Commissioner affirms the initial decision of the Administrative Law Judge, both for the reasons stated therein and for the reasons that follow. The Commissioner has long held, most recently in McGrath v. Kenilworth Bd. of Ed., decided by the Commissioner July 21, 1989, that the requirement for personal notice of Board action to an affected individual does not extend to matters to be discussed in public session, but only to those to be discussed in private, and then primarily to afford the affected individual the right to request public discussion if he or she so desires. The language of the Open Public Meetings Act (OPMA) does not require matters of the type raised in this case to be discussed in private, nor does it give affected individuals a right to private deliberations or a choice between public and private; rather, it gives public bodies the option of private discussion, which option can be overridden by the wishes of the affected individual(s). Where discussions are scheduled to be fully public, and subsequently are, no violation can be claimed solely by reason of failure to offer affected individuals the option of public discussion.*

With respect to Petitioner Nazarechuk's tenure/seniority claim, the Commissioner will not require the Board to alter its curriculum to accommodate petitioner, as it would have to do to enable him to teach the program to which he claims entitlement. The district's family life program, as the record demonstrates, is diffused throughout the elementary curriculum and taught by teachers

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* The Commissioner here notes, to avoid any potential misunderstanding, that he construes the footnote from Oliveri cited on p. 8 of the initial decision to mean that, where private deliberations occur, the option for public discussion can only be granted when all affected parties so request; not that there is any absolute right to private deliberations under N.J.S.A. 10:4-12b(8).

with elementary endorsements. To enable petitioner to teach family life, instruction would have to be localized within a discrete health/physical education curriculum, the only subject petitioner is certified to teach. To require the Board to revamp a fully legitimate approach to family life instruction merely to accommodate a disputed reduction in employment is beyond the scope of protection envisioned in Capodilupo, supra, and Bednar, supra, which held only that seniority regulations could not be used to defeat a "riffed" employee's tenure rights. These later cases in no way alter the Commissioner's past holdings that boards need not make family life assignments on the basis of employment claims.

Accordingly, the Commissioner determines to affirm the initial decision of the Office of Administrative Law and dismiss the instant Petition of Appeal.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE TOWNSHIP OF BRICK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MAYOR AND COUNCIL OF THE TOWNSHIP OF BRICK, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioning Board filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. Respondent Mayor and Council (Council) filed timely reply exceptions thereto. However, the cross-exceptions filed by Council were in fact primary exceptions to the conclusions and findings of the ALJ and thus are deemed untimely received. Said cross-exceptions are not considered in the Commissioner's review of this matter, therefore.

The Board excepts to the conclusions drawn by the ALJ concerning the following line items: 212 - Salaries of Supervisors of Instruction - $156,069; 213 - Salaries of Teachers - $80,000; 220 Text Books - $21,000; 230a - School Library Books - $18,000. Regarding the first two accounts, the Board argues strenuously that the ALJ's rationale for not restoring the amounts requested were predicated upon information obtained during settlement negotiations. The Board avers that as "a matter of public policy" (Board's Exceptions, at p. 1), an ALJ is prohibited from using information gained during settlement negotiations.

Pertaining to account 212 - Salaries of Supervisors of Instruction, the Board further excepts to the ALJ's conclusion that the three proposed supervisory positions were unnecessary because the duties were presently being undertaken by other personnel. The Board finds this argument untenable, arguing that while this may be true,

> [i]t is quite likely therefore, that these additional duties are prohibiting the current administrative personnel from adequately performing their present duties as well as the added supervisory duties all of which negatively impact upon the ability of the School District to provide a thorough and efficient education to the pupils in the School District. (Id., at p. 2)

The Board further avows that the ALJ ignored the affidavit of the superintendent, who relied on the statement of the county superintendent that the supervisors were necessary. Moreover, it

submits that while it is true that the specific information regarding the present status of supervisory employees within the district was not included in any of the affidavits submitted, an outline of the needs of the district was supplied to the ALJ through the superintendent's affidavit, the monitoring report on this topic, statistics the superintendent included in his affidavit, and the affidavit of the Board Secretary/Business Administrator. The Board submits that the proofs it proffered are sufficient to mandate that no reductions take place in account 212, and that the ALJ ignored the specifics proffered in the above-stated documents. It adds:

> As the Commissioner is well aware, core proficiency testing is being implemented this year. It is the position of the Educators within the District that with the implementation of such a program, it is of utmost importance to have specialists not generalists who have expertise in the specific curriculum content areas to achieve maximum results. Without the additional supervisors requested the Board is neglect (sic) in its duty to provide a thorough and efficient education. (Id., at p. 3)

Concerning account 213 - Salaries of Teachers - $80,000, the Board further submits that the ALJ ignored a comment in the superintendent's affidavit quoting the county superintendent suggesting that "A comparison of child study team members and supervisors with other districts based upon enrollment clearly shows the Brick Schools are understaffed***." (Id., at p. 4) The Board further contends the ALJ ignored the superintendent's and the School Business Administrator's affidavits which concur that projections for staffing for the 1988-89 and 1989-90 school years were inadequate and, further, that while additional teaching staff was needed and hired during the 1988-89 and 1989-90 school year, the funding for these positions has been reduced by the governing body as being unnecessary. The Board avers the facts require a contrary conclusion.

As to account 220 - Text Books - $21,000, the Board excepts to the ALJ's rationale for reducing its budget by $21,000 for failure to include the publisher's name from which the disputed textbooks would be purchased. It claims it did not deliberately withhold such information, but rather that no one publisher is pre-determined when the budget is proposed nor necessarily at the beginning of any given school year. It avows that at the time of the instant budget proposal, such information was not compiled and, therefore, it was impossible to submit in support of the Board's budget appeal. It claims that the ALJ should have been concerned with the impact of the proposed textbook budget cut on the students "*** rather than the trivial issue that no publisher has been named by the School Board." (Id., at p. 6)

Concerning account 230a -School Library Books - $18,000, the Board cites the superintendent's affidavit for the proposition that Brick Township lags behind in per pupil expenditure on library books. Further, it claims again that it is impossible at the beginning of the school year to make specific recommendations as to

what books or materials will be purchased for the library. It avers that it is virtually impossible, therefore, to provide the ALJ with a list of such items considering the variables involved in making a determination as to which items will finally be purchased, especially in light of the fact that such expenditures are made throughout the year rather than at one time at the beginning or at the end of the year. It adds:

> In his discussion in support of the decision to uphold the reduction in this account, the Administrative Law Judge makes a statement that "neither the Superintendent nor the School Business Administrator take issue with the governing body's assertion in regarding the appropriation of $25,000 for account 230A in the 1988/89 current expense budget and has not been expended as of February, 1989." This statement is false, misleading and unexplainable. In fact, the Administrative Law Judge makes a distinct contradiction when he directly quotes from School Business Administrator Stutts' Affidavit, "the $25,000.00 which is budgeted for this line item for 1988-89 was earmarked for special education-library books which were to be adopted with a curriculum which was in development. The curriculum was not completed during the 1988-1989 school year and thus the funds were not expended at that time. However, the appropriations became a part of surplus and reduced the 1989-1990 budget. The special education curriculum has been completed and the $25,000.00 one again budgeted and earmarked for the special education library." It is quite evident therefore even by the Administrative Law Judge's own admission that this situation was addressed and completely explained by School Business Administrator Stutts in his Affidavit as cited in the Administrative Law Judge's own opinion. (Id., at p. 7)

The Board thus concludes by asking that the Commissioner restore all monies sought under the following accounts as well as those monies restored in the initial decision.

By way of reply exception, Council states generally the standard of review in school budget challenges brought before the Commissioner of Education, as articulated in Board of Education of East Brunswick Township v. Township Council of East Brunswick Township, 91 N.J. Super. 20, 26 (App. Div. 1966), aff'd 48 N.J. 94 (1966) claiming that "the standard of review to be applied by the Administrative Law Judge and the State Commissioner of Education is a narrow one, searching only for arbitrary action of the municipal governing body which has the effect of denying the School Board sufficient funds to provide a 'thorough and efficient system of free public schools.'" (Reply Exceptions, at p. 3) It further expresses that the burden remains on the board to show "*** the Township Council's decisions concerning the school budget were without any

reasonable foundation and that those decisions have the effect of depriving the students in the district of even minimum standards of a thorough and efficient education." (Id., at p. 4)

More specifically, Council replies to the Board's first exception regarding account 212 by claiming that the Board failed to meet its burden of proof that the amount in question in account 212 is necessary to operate a thorough and efficient system of schools. Averring that the record and the Board's exceptions fail to demonstrate that a thorough and efficient education cannot be provided without the new positions, Council suggests instead that the record reflects that the district can and has been able to operate effectively without the new positions. "More importantly, the Judge correctly concluded that the School Board failed to show the remaining $176,224 in the Supervisors' Salaries Account is insufficient to provide all of the supervisors necessary for a thorough and efficient system of schools.***" (Id., at p. 5) It claims the reduction of $156,000 from account 212 should be sustained therefore.

Council further contends that the Board's claim of inadmissible evidence from settlement negotiations is without merit. Council contends the meetings between the Township governing body and the Board are not protected settlement negotiations under law but, rather, constitutes mandatory and fact-finding discussions. It cites N.J.S.A. 18A:22-37 in this regard which, it claims, "requires *** the municipal governing body [to] review the budget and determine the amount, in its judgment, which is necessary for a thorough and efficient school system, 'after consultation with the board.'" (Id.) Council contends said statute does not require the parties to engage in settlement discussion nor to seek resolution short of litigation. It argues that the Board's position would allow the Township to rely upon information gained at such consultation meeting in making its budgetary decision but would foreclose reliance on this information when called upon to defend its position on appeal. It cites International Potters Co. v. Richardson, 63 N.J.L. 248 (A. & E. 1899) for further proof that the consultation it held with the Board is not a settlement discussion but rather an investigatory hearing. It suggests that there was no litigation pending at the time and no adverse claims between the parties to settle at that point. Thus, it avers, "[e]ven if the Township Committee agreed to the School Board's alleged 'settlement offer,' the School Board was free to appeal the decision of the Township." (Id., at p. 6)

Finally, in regard to account 212, Council claims that the statistical evidence presented by the School Board regarding County and State averages of the expense for supervisors is irrelevant. "The law does not require a 'statistically average system of schools,' and the only proper evidence regarding the amount necessary to provide a thorough and efficient system of schools." (emphasis in text) (Id., at p. 7). Thus, Council submits, the Board of Education has failed in its burden of proof and the ALJ's decision regarding account 212 should be upheld.

Similarly, Council claims the School Board also failed to meet its burden of proof regarding the necessity of the reduction

imposed in account 213 for Teachers' Salaries. It reiterates its argument concerning settlement negotiations and comparative costs in other districts as irrelevant in respect to this as well as account 212.

Further, Council claims that the fact that additional personnel have been hired from this account is neither relevant nor shown to be accurate. It claims that the Board's assertion that personnel were added does not indicate that other existing positions were terminated. It argues that the Board failed to show the net difference which would require additional funds. Additionally, it claims that actual experience in the subject budget year is irrelevant, and the determination concerning the reasonableness of the Township's budget should be based only upon the items included in the Board's budget submitted to the voters in April 1989 and the needs for the items challenged as they existed on the date of the Council's April 1989 budget resolutions. "Otherwise, the School Board could simply hire and buy all items cut in April during the beginning of the budget year and later claim necessity before the Commissioner of Education based upon the fact that the positions have already been filled and various items have already been purchased." (Id., at p. 8) For failure to meet its burden of proof regarding account 213, Council would have the Commissioner affirm the ALJ's determination.

Pertaining to account 220, Text Books, Council states:

> The Petitioner claims that the reduction of $21,000 from the 220 Textbook Account will have a devastating effect upon the students. No explanation or support for this bold allegation is given. In fact, the School Board admits that the curriculum for these extra textbooks has not even been developed yet. Although it may be reasonable for the School Board to desire the flexibility that the subject funds would afford for a textbook and curriculum placed on administrative hold, it cannot be said that the undeveloped textbook and curriculum are necessary for a thorough and efficient education. The Township's approved appropriation of over $220,000 for textbooks is $5,000 in excess of last year's appropriation, which the Township reasonably determined to be a sufficient appropriation for the textbook needs of the district. Therefore, this budget reduction should be sustained on appeal. (emphasis in text) (Id., at p. 10)

Regarding account 230a for Library Books, Council states:

> Again in the 230A Account for Library Books, the Petitioner is relying upon undeveloped curriculum and a contingency need for the extra funds in issue. No effort is made to show the effect of the Township's budget cut in terms of historical

> data regarding expenditures in this account, presumably because the School Board's past experience would not justify the large appropriation made.
>
> The School Board also relies upon comparison data regarding State-wide and County-wide expenditures per pupil, without taking into account the level of sufficiency of the current library system already provided. Again, the Township is not obligated to provide a statistically average school system, but rather a thorough and efficient system of schools is mandated and there is no evidence that the Township has arbitrarily failed to provide the same. The reduction of the 230A Account, therefore, should stand.
>
> (Id., at p.11)

At the outset of the review of the instant budget matter, the Commissioner would correct what appears to be a misperception on Council's part concerning the Commissioner's standard of review in budget cases brought before him. Although Council accurately quotes from the Appellate Division decision in East Brunswick, supra, the standard of review cited therein is not the precise standard of review applied in budget hearings, albeit that the Appellate Division's determination was affirmed, in toto, by the Supreme Court. Rather, the Commissioner's purview of budget matters is more expansive than that extremely narrow Appellate Division interpretation of the standard which Council suggests holds that:

> Department of Education is bound to respect the municipal governing body's exercise of judgment and discretion in determining the school board's budget, and that it may not supplement the Township's budget merely because of the State Commissioner's concept of what a better budget would be***. (Id., at p. 2)

Rather, the Supreme Court in East Brunswick held:

> As in Booker, the Commissioner in deciding the budget dispute here before him, will be called upon to determine not only the strict issue of arbitrariness but also whether the State's educational policies are being properly fulfilled. Thus, if he finds that the budget fixed by the governing body is insufficient to enable compliance with mandatory legislative and administrative educational requirements or is insufficient to meet minimum educational standards for the mandated "thorough and efficient" East Brunswick school system, he will direct appropriate corrective action by the governing body or fix the budget on his own within the limits originally proposed by the board of education. On the other hand, if he

finds that the governing body's budget is not so inadequate, even though significantly below what the Board of Education had fixed or what he would fix if he were acting as the original budget-making body under R.S. 18:7-83, then he will sustain it, absent any independent showing of procedural or substantive arbitrariness. See 91 N.J. Super., at pp. 24-26. (48 N.J. at 107)

Thus, where need be, the Commissioner can and will consider circumstances beyond the strict issue of arbitrariness in considering a budget, including the current circumstances of the district's ability to provide a thorough and efficient education, the State's educational policies as the district is implementing them, and whether the district's budget reflects compliance with the legislative mandates and administrative educational requirements. Any arguments that would limit the Commissioner's review of budgets to the narrow one suggested by Council, that is "searching only for arbitrary action of the municipal governing body which has the effect of denying the School Board sufficient funds to provide a 'thorough and efficient system of free public schools" (Reply Exceptions, at p. 3) are rejected.

Moreover, the Commissioner reads the directive of the Supreme Court in East Brunswick, supra, at 107, that he review budgets to ensure meeting "minimum educational standards for the mandated 'thorough and efficient'***" school district to mean those monies, staff and facilities necessary to provide said thorough and efficient system of education. See East Brunswick, supra, at 108 wherein the Court spoke of the Board's obligation to challenge a municipal governing body's cuts "[w]here*** it was satisfied that the governing body's action was erroneous and would deprive the local school system of necessary teaching staffs and physical facilities***." (emphasis supplied) It is with these standards in mind, that the Commissioner approaches his review of this, and all budget matters brought by way of petition of appeal for his consideration.

Moving to the first area challenged, account 212 - Salaries for Supervisors of Instruction, which line item Council cut by $156,069, the Commissioner's review of the record before him cannot support the ALJ's failure to restore said amount to the Board's budget for 1989-90. Having reviewed the record, including the monitoring report, budgets for the past three years, the affidavits of record, and the district's audit for fiscal year ending June 30, 1989, the Commissioner observes that for the 1987-88 school year, the Board did expend all of the $157,300 apportioned for such salaries. It is further noted that $162,437 was appropriated for the 1988-89 school year. The Commissioner surmises from such figures that the difference between what was appropriated in 1987-88 and the $162,437 appropriated for 1988-89 must be accounted for by the natural growth in the salary scale. Notwithstanding that the record is devoid of information from the Board as to who the supervisors employed are and their salaries, there is ample evidence to suggest that the $156,069 sought by the Board beyond the $176,000 remaining in the budget for supervisors' salaries for the 1989-90 school year represents salary for a minimum of three additional

supervisory positions which the county superintendent indicates are necessary to provide a thorough and efficient education. See Superintendent Aragona's Affidavit dated October 23, 1989, at p. 3. See also, monitoring report at Item 7.3, page 4. It must be assumed that the county superintendent's requirement that the Board hire additional supervisors is necessary for the district to satisfy the requirements of providing a thorough and efficient system of education. The Commissioner further notes that this deficiency is one of the factors resulting in denial of certification of the district. Accordingly, the Commissioner rejects the ALJ's conclusion to not restore $156,069 to account 212.

In so concluding, he rejects the Board's argument that the consultations between it and Council herein constitute settlement negotiations which as "a matter of public policy cannot be considered in these proceedings." (Exceptions, at p. 1) As noted by Council, the discussions to which the Board refers took place between the Board and Council pursuant to N.J.S.A. 18A:22-37 and do not constitute settlements or privileged discussions within the intendment of the term as used in N.J.A.C. 1:1-15.10. The language of the statute is plainfaced: the purpose of said conference between the Board and the governing body is for consultation, not negotiation of a dispute or litigation settlement. As Council points out, at the time such discussion in this matter took place, no litigation was pending or even a claim filed by the parties seeking the Commissioner's review of any such differences.

Moreover, as was also suggested by Council, the nature of the consultation mandated by N.J.S.A. 18A:22-37 is to enable the governing body to determine the amount which, in its judgment, is necessary to be appropriated for each item of the defeated budget for provision of a thorough and efficient education and also to certify to the county board of taxation the total amount the governing body determines is necessary for the specific budget categories mandated by N.J.S.A. 18A:22-37. To disallow information from coming into the record from such consultation, effectively, would provide Council information gained at such meeting in making budgetary determination, but then preclude it from relying on any such information gained if and when it sought to defend its position should the matter be appealed. On the other hand, the Board has the option of attempting to persuade the governing body at such consultation of its position regarding budgetary measures by proffering information known to it as a means of supporting its budgetary recommendations. Accordingly, the Commissioner finds and determines that evidence submitted during the discussions and consultations mandated by N.J.S.A. 18A:22-37 are admissible on appeal before the Office of Administrative Law and before the Commissioner of Education free from privilege or privy relative to settlement negotiations.

As to account 213, Salaries for Teachers, the Commissioner affirms the ALJ's determination to not restore the $80,000 sought by the Board. Following his careful and independent examination of the evidence, including the number of teachers in the district, the teacher salaries' budget appropriations dating back to the 1987-88 school year as well as the affidavits of record, including the appendix affixed to Superintendent Aragona's October 1989 affidavit,

the Commissioner is at a loss, based on the record before him to find any indication what impact growth in the salary guide in the last two years has had on the budget allocations for teacher salaries. Moreover, on the basis of the limited information provided by the Board, he cannot determine the net difference among the number of teachers currently budgeted for, the reduction in force of seven such teaching staff members in the 1989-90 school year (see Robert Stutt's Affidavit, at p. 9) and the decline in the number of students by 167. While he can perhaps surmise that $80,000, the amount cut by Council in this line item, might constitute salary for four teachers, no clear need for said restoration has been advanced by the Board in light of the pupil decline, even if it were clear that the reduction in force of seven teachers was made because of the decline in the number of pupils currently in the district. Neither the affidavit submitted by Superintendent Aragona, August 21, 1989, nor his supplementary affidavit dated October 23, 1989 sheds light on why four more teaching staff positions are required. Teacher aides, a topic mentioned in Dr. Aragona's second affidavit, are not at issue in account 213, Salaries for Teachers. Vague assertions made in his second affidavit that since October 13, 1989 there have been an increased enrollment and classification of special education students requiring more special education teachers are inadequate to justify restoration of $80,000. Accordingly, the Commissioner adopts the ALJ's conclusion to not restore $80,000 to account 213, based on the Board's failure to bear the burden of persuasion that the funds are necessary for the provision of a thorough and efficient education.

Concerning account 220 - Text Books, the Commissioner's review of the record comports with the ALJ's that the reduction of $21,000 from this account should be sustained. The superintendent's affidavits concerning the "administrative hold" on text books account is somewhat puzzling to the Commissioner. If the Board of Education had not made a decision by the beginning of the school year in question concerning what textbooks it would use to complement the curriculum requirements it established in science and social studies, including the name of the text books and the publisher of them, it defies logic that the Board would implement the use of such books midyear, should it decide, somewhere in the course of the school year, which volumes to acquire. While it is perfectly understandable from the Commissioner's perspective that the Board and its professional staff may not have reached a decision on which text books to choose during the process of budget development, once the school year began, however, the Board's decision should have been made so that the text books selected and purchased could be implemented by the commencement of the school year's studies. Consequently, once the Board makes a determination as to which text books, by which publisher, to acquire in order to implement its curriculum plan, then the cost for such materials should be included in the 1990-91 budget. The Commissioner observes that even as of the date of the exceptions filed in this matter, the Board had still not resolved which text books to purchase. Therefore, the Commissioner finds the Board has failed to meet its burden of persuasion for restoration of the $21,000 reduction in account 220.

Finally, regarding account 230a - Library Books, the Commissioner reverses the ALJ's determination to sustain the reduction in this account. The Commissioner's review of the information advanced by the Board from its Middle State's evaluation suggesting that the low per pupil expenditure for library books in the district provides a sufficient showing, in his opinion, to justify the requested increase in funding for the libraries of the district. Unlike the text book situation spoken of above, library printed and visual media materials can be acquired throughout the course of the school year and can significantly impact on the educational program. Therefore, the Commissioner finds and determines that the governing body's reduction of $18,000 from account 230A shall be restored.

As to the remaining line items discussed in the initial decision, the Commissioner adopts the findings and conclusions of the Office of Administrative Law for the reasons expressed by the Administrative Law Judge.

Accordingly, for the reasons expressed herein, the Commissioner adopts in part and reverses in part the initial decision in this matter. Consequently, the following schedule applies to the 1989-90 school budget in Brick Township:

	CURRENT EXPENSE
Original Tax Levy	$35,373,926
Reduction	650,000
Tax Levy After Reduction	34,723,926
Amount Restored	539,150
Tax Levy After Restoration	35,263,076

The Ocean County Board of Taxation is hereby directed to make the necessary adjustment set forth above to reflect a total amount of $35,263,076 to be raised in the 1989-90 tax levy for current expense purposes for school year 1989-90.

IT IS SO ORDERED this _____ day of January 1990.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1125-89
AGENCY DKT. NO. 5-1/89

THOMAS L. BRUSKY,
Petitioner,
v.
NEPTUNE TOWNSHIP
BOARD OF EDUCATION,
Respondent.

Wayne J. Oppito, Esq., for petitioner

James T. Hundley, Esq., for respondent (Patterson & Hundley, attorneys)

Record Closed: November 10, 1989 Decided: December 18, 1989

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Thomas L. Brusky (petitioner), presently employed by the Neptune Township Board of Education (Board) as a department chair, claims in a petition of appeal filed to the Commissioner of Education that the Board improperly appointed a person without tenure in its employ to a position of supervisor of instruction in which he claims an enforceable tenure and seniority right. After the Commissioner transferred the matter on February 15, 1989 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a prehearing conference was held during which it was agreed the issue of the case was whether petitioner's tenure and/or seniority rights as a supervisor of instruction were violated by the Board when it appointed another to the position of supervisor of curriculum and instruction during November 1988. A hearing was conducted October 20, 1989 after which the record closed on November 10, 1989 when the parties filed memoranda in support of their respective positions.

The conclusion is reached in this initial decision that petitioner established by a preponderance of credible evidence an enforceable tenure right to the position of supervisor of curriculum and instruction. The conclusion is further reached that the Board violated petitioner's enforceable tenure right to such position when it appointed another during November 1988 to such position.

BACKGROUND FACTS

The background facts of the matter which give rise to this dispute are not in dispute between the parties despite the hearing which was conducted. Their respective letter memoranda shows that the facts, all of which are established by the evidence at hearing, are these.

Petitioner is a tenured employee in the Neptune Township school district, having been continuously employed by the Board in several instructional and supervisory positions since 1963. From July 1977 through June 30, 1986 petitioner was employed by the Board as a supervisor of instruction for grades 7 through 12. During that time, petitioner met all job qualifications for that position. He supervised the humanities, business, industrial arts, and home economics.

According to a job description (R-1) for the position supervisor of instruction, which description was subsequently revised during September 1979 (P-1), petitioner as supervisor of instruction was obligated to possess a supervisor certificate, together with three years of educational experience. Petitioner was expected to supervise staff members as assigned initially by the building principal or superintendent of schools (R-1), but then subsequently amended to supervise staff members as assigned only by the superintendent of schools (R-1). The performance responsibilities expected of petitioner as supervisor of instruction are typical performance responsibilities expected of any supervisor of instruction including providing effective supervision of tenured and non-tenured classroom teachers, serving as a member of curriculum steering committees, preparing teacher evaluation reports, meeting with and assisting teachers, scheduling, planning, and conducting meetings to carry out educational and supervisory functions, and so on. There is no significant difference between the description supervisor of instruction (R-1) and as subsequently amended during September 1979 (P-1).

In the meantime, while petitioner was serving as supervisor of instruction he was also assigned by the Board the duties during August 1985 as supervisor of vocational education, kindergarten through 12, along with his other supervisory duties. According to petitioner's unrefuted testimonay, as supervisor of vocational education he was primarily involved in securing funds for the Technology For Children Program at the elementary level. Petitioner performed no formal observations and evaluations of teachers at the kindergarten through sixth grade level as supervisory of vocational education.

Effective June 30, 1986 the Board abolished the position of supervisor of instruction then held by petitioner. The Board also abolished another position entitled curriculum coordinator which it then had in existence. Finally, the Board created seven positions of general supervisor of curriculum and instruction, grades kindergarten through 12. Ostensibly, the new positions of general supervisor combined the duties of the former position of supervisor of instruction and curriculum coordinator. Nevertheless, there is no job description for the former position of curriculum coordinator in this record in order to make such a comparison. The job description for the then-created positions of general supervisor of curriculum and instruction, K-12, is in evidence (J-2). According to this job description, the persons appointed to the position of general supervisor must possess a New Jersey permanent teacher certficate, a New Jersey school supervisor certificate, and have experience in school and program improvement activities. The general supervisors are responsible for supervising professional staff as determined by the "* * * yearly assessment and evaluation of school, program and student needs * * *". The performance responsibilities for the general supervisor are, compared to the job descriptions (R-1) (P-1), are similar if not identical to each other with the exception that the general supervisor is to assist not only building principals, teachers, and regular professional staff in planning instructional programs, but is also to assist the assistant superintendent of schools. A fair reading of the job description for supervisor of instruction as held by petitioner demonstrates that petitioner was expected to assist all professional staff, including whatever assistant superintendent of schools may have existed, at the time he held that position.

Despite petitioner applying for the position of general supervisory of curriculum and instruction, he was not appointed to any one of the seven general supervisor positions created effective July 1, 1986. Petitioner did not file a petition of appeal at the time.

During September 1988, one of the seven general supervisors of curriculum and instruction was appointed by the Board to be the principal of one of its elementary schools. The Board posted the notice of vacancy for general supervisor (C-1) which states the qualifications as a supervisor certificate, a preference for mathematics certificate though not necessary, and three years successfuly experience in school and program improvement activities.

Petitioner applied for the vacancy during September-October, 1988 but was unsuccessful. The Board, it agrees, appointed another employee to the vacant position who had not acquired a tenure status in its employ as a supervisor.

ARGUMENTS OF THE PARTIES

Petitioner contends that he is entitled to be appointed to the position of general supervisor of curriculum and instruction by virtue of his acquisition of a tenure status in the statutorily enumerated position of supervisor under N.J.S.A. 18A:28-5 and as that statute is applied in Capodilupo v. West Orange Tp. Bd. of Ed., 218 N.J. Super. 510 (App. Div. 1987) and Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987).

While petitioner anchors his argument on his enforceable tenure right, he also argues that he is entitled to appointment to the position of general supervisor of curriculum and instruction by virtue of his enforceable tenure rights over a non-tenured person holding that position.

The Board, to the contrary, contends that because the position of general supervisor of curriculum and instruction, kindergarten through 12, is a district-wide supervisory position while petitioner had previously served only in a grade 7 through 12 supervisory position he is not titled to appointment to the general supervisory position under current seniority regulations at N.J.A.C. 6:3-1.10. Furthermore, the Board contends that because they are different positions petitioner's acquisition of tenure under N.J.S.A. 18A:-28-5 is only to the position of supervisor of instruction, grades 7 through 12, and not in the general supervisor position, grades kindergarten through 12.

ANALYSIS

This case may be decided solely upon the basis of petitioner's tenure claim as a supervisor in the Board's employ. The statutory rights regarding individuals with a tenure status in the employ of any board of education which are affected by a reduction in force are set forth at N.J.S.A. 18A:28-12 which provides, in part, as follows:

> If any teaching staff member shall be dismissed as a result of such reduction, such persons shall be and remain upon a preferred eligible list in the order of seniority for re-employment whenever a vacancy occurs in a position for which such persons shall be qualified and he shall be re-employed by the body causing dismissal * * *

In Bednar, supra, the Appellate Division recognized that:

> The Tenure statute authorizes the creation of seniority regulations to rank the job rights of tenure teaching staff in a RIF * * * [citations omitted] * * * the statute does not create or authorize the Commissioner to create competing rights for non-tenured teachers.

The Court stated that the tenure statute does not contemplate use of seniority to justify retaining a non-tenured teacher in a position within the certificate of a dismissed tenured teacher. 221 N.J. Super. at 242.

In Capodilupo, supra, the Appellate Division affirmed the reinstatement of an individual who had obtained tenure as a teacher of physical education to the position of teacher of physical education at the elementary school despite the fact the teacher had no demonstrable experience in the elementary school position over a non-tenured teacher with actual experience at the elementary level. The Court also held that a tenured teacher is entitled to retention as against a non-tenured teacher under the Tenure law and that to hold otherwise would be to defeat the purpose of tenure which was to give a measure of security to teachers after the prescribed numbers of service. 218 N.J. Super. at 514-15.

Following Capodilupo and Bednar, the Commissioner issued several opinions applying the principles articulated by those courts. Among the opinions issued is Bodine v. Burlington Board of Education, 1989 S.L.D. _____ (Feb. 22, 1989) which involved a tenured elementary school principal, Bodine, whose position was eliminated in 1979 through a

reduction-in-force. He alleged that the appointment of a non-tenured individual to the position of principal in 1988 violated his tenure rights. The Board maintained that Bodine did not sufficiently establish his qualifications for the principalship in light of the expiration of nine years from the date of his reduction in force. The Commissioner, adopting the reasoning of the administrative law judge, held that the phrase "qualified" at N.J.S.A. 18A:28-5 regarding an individual who seeks re-employment following a reduction in force must hold the appropriate certificate for the vacant position. The Commissioner also held that to interpret the phrase "qualified" requiring any other standard is beyond the scope of the legislation as it is presently written.

CONCLUSION

The facts in this case establish that petitioner acquired tenure as a supervisor in the employ of the Board pursuant to N.J.S.A. 18A:28-5. The facts further demonstrate that petitioner is qualified to hold the position of general supervisor of curriculum and instruction, grades kindergarten through 12, as that position is in existence in the Board's organization. The facts further demonstrate that petitioner was entitled to appointment to the position general supervisor of curriculum and instruction, grades kindergarten through 12, over a non-tenured supervisor in or about September-October 1988 when he made known his desire to be appointed to such position. The failure of the Board to appoint petitioner to the position when he applied in September-October 1988 violates, I **CONCLUDE**, petitioner's tenure rights. Therefore, I **CONCLUDE** petitioner has carried his burden of persuasion to establish by a preponderance of credible evidence that the Board did under the law violate his tenure rights to appointment to the position of general supervisor of curriculum and instruction, grades kindergarten through 12, during November 1988 when it appointed to that very same position another person without a tenure status as supervisor.

Petitioner, accordingly, is entitled to appointment to that position as of December 1, 1988, the effective date of the appointment by the Board of the non-tenured supervisor to that position. In addition, petitioner is entitled to the difference in wages he received compared to what he should have received as a general supervisor of curriculum and instruction from December 1, 1988 forward, along with all other benefits and emoluments which accompany that position.

It is so **ORDERED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

December 18, 1989
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

Dec. 20, 1989
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

DEC 21 1989
DATE

OFFICE OF ADMINISTRATIVE LAW

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THOMAS L. BRUSKY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

The Commissioner fully concurs with the analysis and conclusion of the Administrative Law Judge. In the wake of Capodilupo, supra, and Bednar, supra, it is clear that the scope of duty and grade level distinctions, which play so crucial a role in seniority determinations, have no place in limiting the rights of tenured teaching staff against those of nontenured. In this instance, petitioner is tenured as a supervisor, and the position to which he lays claim is a supervisory position held by a nontenured incumbent; as a matter of law, there can be only one conclusion.

Accordingly, the Commissioner affirms the decision of the Office of Administrative Law for the reasons stated therein and adopts it as the final decision in this matter. Petitioner is entitled to appointment as K-12 supervisor of curriculum and instruction effective December 1, 1988, and to all benefits and emoluments, including pay differential, accompanying that position from the date of entitlement onward.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION AND
PARTIAL SETTLEMENT
OAL DKT. NO. EDU 8179-88
AGENCY DKT. NO. 314-9/88

PINELAND LEARNING CENTER,
Petitioner,
v.
NEW JERSEY DEPARTMENT OF EDUCATION,
Respondent.

James J. Seeley, Esq., for petitioner
Diane M. Verlangieri, Deputy Attorney General, for respondent (Peter N. Perretti, Jr., Attorney General of New Jersey, attorney)

Record Closed: November 5, 1989 Decided: December 28, 1989

BEFORE EDGAR R. HOLMES, ALJ:

PROCEDURAL HISTORY AND STATEMENT OF THE CASE

Fred Eccleston is the proprietor of a private school for the handicapped, Pineland Learning Center (Pineland). He is also the President and Executive Director of Pineland. In addition, Eccleston is the President and proprietor of Manumuskin Enterprises, which operates a school bus company. Pineland receives pupils from local school districts; Manumuskin transports the students to and from special events but not to and from the school on a regular basis.

The Department of Education monitored Pineland's 1987 books of account, among other things, in order to determine the tuition rate per pupil.

Pineland objected to certain portions of the monitoring report, prepared by the Department of Education. It requested a hearing. The matter was transmitted to the Office of Administrative Law (OAL) to be heard as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on January 9, 1989, at which the following issues were identified for trial:

1. Does Pineland require a policy concerning evaluation and placement of handicapped pupils and does it presently have such a policy?

2. Can Pineland add and delete information on pupil records if pupil records are the property of sending districts?

3. Were staff and parents involved in developing the special education plan for Pineland in 1987?

4. Is a life insurance policy for Fred Eccleston in an amount in excess of other staff members life insurance policies a nonallowable cost?

5. Should administrative charges for the benefit of Manumusklh Enterprises be disallowed?

6. Is the transportation arrangement between Pineland and Manumuskin Enterprises a lease?

A plenary hearing convened on May 17, 1989. At the plenary hearing, the parties advised that the first three issues were amicably resolved and they stipulated as follows:

1. The Department of Education has determined that Pineland Learning Center has a policy concerning evaluation and placement of handicapped pupils approved by the Department.

2. Pineland Learning Center can add information onto pupil records when the pupil records are the property of a sending school district in accordance with a policy adopted by Pineland Learning Center and approved by the Department.

3. The Department has determined that staff and parents were involved in developing the special education plan for Pineland in 1987. The Department will delete the negative statement of that issue in its monitoring report section 8.10 - Program.

After the stipulations were made and entered on the record, evidence was taken on the remaining issues. However, the record was held open for additional testimony from accountants.

On or about July 7, 1989, however, the parties filed a Consent Order which fully disposed of the 5th issue. it contains the following stipulations:

1. Petitioner, Pineland Learning Center, Inc., agrees that the operation of Manumuskin Enterprises, Inc. is conducted in part at a facility located at Rogers Avenue, Carmel, New Jersey.

2. Petitioner, Pineland Learning Center, Inc., agrees that billing and other associated paperwork pertaining to the operation of Manumuskin Enterprises, Inc. is conducted in part at a location other than Pineland.

3. Petitioner, Pineland Learning Center, Inc. agrees that the operation of Manumuskin Enterprises, Inc. conducted at Pineland is as stated in the Estimated Allocation of Costs Report prepared by Jump, Bowe and Company. A copy of this report is hereto attached at JT-3.

4. Petitioner, Pineland Learning Center, Inc., agrees that the facts stated in JT-3 upon which the operational expenses paid by Pineland Learning Center, Inc. for Manumuskin Enterprises, Inc., were determined are true.

5. In consideration of the above, Respondent agrees to accept the allocation methods determined in JT-3 and based on information provided solely by the

Petitioner agrees to accept the amount of $85.00 as the amount of expenses paid by Pineland Learning Center, Inc. for the operation of Manumuskin Enterprises, Inc.

6. Petitioner agrees that this consent order is limited solely to the issue of the amount of expenses paid by Pineland Learning Center, Inc. for the operation of Manumuskin Enterprises, Inc.

7. Petitioner acknowledges that it was provided an opportunity to be heard in accordance with the Administrative Procedures Act P.L. 1968, c. 410 and hereby waives any further hearing on the amount of expenses paid by Pineland Learning Center, Inc. for the operation of Manumuskin Enterprises, Inc.

8. The parties hereto agree that the instant order does not apply and may not be used with respect to any other claim raised in the Petition of Appeal.

On or about October 30, 1989, the parties filed a consent order which fully disposed of the sixth issue. It contains the following stipulations:

1. Petitioner, Pineland Learning Center, Inc., agrees that the contract for lease of equipment is a related party transaction between petitioner and Manumuskin Enterprises, Inc.

2. Petitioner, Pineland Learning Center, Inc., agrees that the cost of ownership incurred by Manumuskin Enterprises, Inc. pursuant to the related party transaction with Pineland Learning Center is as stated in the Actual Cost of Ownership Report prepared by Jump, Bowe and Company. A copy of this report is attached hereto at JT-4.

3. Petitioner, Pineland Learning Center, Inc., agrees that the facts stated in JT-4 upon which the actual cost of ownership incurred by Manumuskin Enterprises, Inc., was determined, are true.

4. In consideration of the above, Respondent agrees to accept the allocation methods determined in JT-4 and based on information provided solely by the Petitioner agrees to accept the amount of $23,604 as the cost of ownership incurred

by Manumuskin Enterprises, Inc. pursuant to the contract for lease of equipment to Pineland Learning Center, Inc.

5. Petitioner agrees that this consent order is limited solely to the issue of the cost of ownership sent forth in JT-4 incurred by Manumuskin Enterprises.

6. Petitioner acknowledges that it was provided an opportunity to be heard in accordance with the Administrative Procedures Act P.L. 1968, c. 410 and hereby waives any further hearing on the amount of cost of ownership incurred by Manumuskin Enterprises, Inc. pursuant to the related party transaction for the lease of equipment to Pineland Learning Center, Inc.

7. The parties hereto agree that the instant order does not apply and may not be used with respect to any other claim raised in the Petition of Appeal.

The parties were unable to resolve the fourth issue and on November 5, 1989, the record closed. The fourth issue covered Eccleston's life insurance policy and whether it was an allowable cost.

The regulation which has been cited in support of the determination to exclude Eccleston's life insurance policy as an allowable cost in the calculation of the certified actual cost per pupil is N.J.A.C. 6:20-4.4(a)17. The regulation reads in pertinent part as follows:

> (a) A cost which is not allowable in the calculation of the certified actual cost per pupil includes the following:
>
> ...
>
> 17. Fringe benefits when the benefits are determined in an arbitrary or capricious manner rather than on a uniform established policy based on an equitable standard of distribution, such as years of service or education.

The policy on Eccleston's life has a face amount of $200,000. It cost $2700. per year. In 1977, the year in question, no written policy of the Board of Directors of Pineland authorized this insurance policy although there is a benefits package

available to all other employees (12 full time employees in 1987) which included a 10,000 life insurance policy. The evidence does not reveal whether the 10,000 policies were authorized in writing.

On February 11, 1988, Mary Eccleston, Secretary, prepared the following notice:

> Meeting was called to order by Frederick W. Eccleston, President.
>
> The following officers were present: Mary M. Eccleston, Secretary.
>
> The purpose of this meeting is to comit [sic] to writing the previously established life insurance benefit policy. The benefit as it existed is as follows:
>
> It is the policy of Pineland Learning Center, Inc. to provide an additional life insurance benefit as per the following qualifications:
>
> After five years of service at Pineland Learning Center
>
> MA degree with certification in educational supervision and administration and
>
> functioning in an educational supervisory position.
>
> The life insurance benefit is available to all employees who meet these above-mentioned requirements.
>
> No other business was discussed. A vote was taken to adjourn the meeting.
>
> Signed
>
> Mary M. Eccleston, Secretary

This writing does not authorize a specific amount although it refers to a previously established life insurance benefits policy. It specifically relates the additional life insurance benefit to years of service, educational attainment and educational supervisory status. These criteria are not arbitrary and unreasonable. Two of them are mentioned in the regulation, years of service and education.

The additional qualification of attaining supervisory status is also a reasonable and recognized criterion for increased emolument.

The regulation does not define "equitable standard of distribution" further than to relate it to years of service or education. It is silent concerning the relativity of benefits paid; whether any ratio should obtain between benefits paid to different classes of employees. I cannot read the regulation to include such an additional standard.

In this case, the Department did not persuade that the additional life insurance benefit was arbitrary and capricious. It acknowledges that another employee will be eligible for the benefit in one and a half years. However, it points out that there is no guarantee that the policy will be available when the other employee, who lacks only the requisite years of service, attains the preferred status.

This observation, while true, is not to the point. The regulation does not require the employer to guarantee fringe benefits. However, should the additional life insurance benefit policy not be available when the second person has achieved eligibility, that would be an indication that the board policy was arbitrary, unreasonable and capricious.

I **CONCLUDE** that the additional life insurance benefit for Eccleston, in excess of other staff members life insurance benefits, is an allowable cost.

I have also reviewed the record and the settlement terms and **FIND**:

1. The parties have voluntarily agreed to the settlement as evidenced by their signatures.

2. The settlement fully disposes of all issues in controversy and is consistent with the law.

I **CONCLUDE** that this agreement meets the requirements of N.J.A.C. 1:1-19.1 and that the settlement should be approved. I approve the settlement and therefore **ORDER** that the parties comply with the settlement terms and that these proceedings be concluded.

This recommended decision may be adopted, modified or rejected by the Commissioner of the **NEW JERSEY DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if **SAUL COOPERMAN** does not so act in forty-five (45) days and unless such time is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with the **SAUL COOPERMAN** for consideration.

12/28/89
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Receipt Acknowledged:

1/3/90
DATE

Seymour Ellis
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 2 [illegible]
DATE

Jaynee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

ldr

PINELAND LEARNING CENTER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law, including stipulations of settlement covering five of the six issues originally in dispute, have been reviewed. Timely exceptions were filed by respondent to that portion of the decision dealing with the single issue not resolved by settlement, and a timely reply thereto was filed by petitioner.

In its exceptions, respondent argues that the ALJ's acceptance of the cost of excess life insurance for Pineland's executive director (Mr. Eccleston, also president and proprietor of the school) as an allowable cost for tuition rate setting purposes was predicated on his having analyzed the policy adopted by Pineland's board of trustees on February 11, 1988 independently of its factual context. That context, asserts respondent, clearly establishes that the policy in question was determined in an arbitrary and capricious manner and that the excess cost of Mr. Eccleston's insurance coverage was properly disallowed as a result.

In reply, petitioner affirms the ALJ's reasoning to the effect that the disputed policy is appropriate on its face and need not have been in writing to have been in force during the year in question (1987). It is also noted that Mr. Eccleston's salary at this time was well below that maximum allowed by law and that, had he wished to give himself additional unreasonable compensation, he could have raised his salary by at least four times the value of the disputed insurance premium ($2,700) and still been within the limits of regulation.

Upon careful review of this remaining controverted matter, the Commissioner determines that the excess cost of Mr. Eccleston's insurance was properly disallowed by the Department of Education in its audit of 1987 accounts for tuition rate setting purposes.

He does so primarily because, apart from a single statement within the written policy document adopted on February 11, 1988 (Exhibit P-1), there is no evidence in the record to indicate that a prior unwritten policy on the controverted matter did in fact exist. The Commissioner has long held that mere practice or expression of intent does not constitute an official policy; while

there is no requirement that all policies be in writing, no policy can be found to exist absent evidence that it was duly adopted by formal action of the governing body. Central Regional Education Association v. Bd. of Ed. of the Central Regional High School District et al., 1973 S.L.D. 247, aff'd State Board 254, appeal dismissed by Appellate Division 1975 S.L.D. 1075, Cert. denied 68 N.J. 163 (1975); Nicolas Campanile v. Bd. of Ed. of Middletown Township, decided by the Commissioner March 2, 1982 No such evidence was presented in this case.

In addition, the factual context in which the present written policy was adopted (immediately following State monitoring visits wherein lack of an established policy was identified as a problem, and with language explicitly tailored to the regulation cited as the basis of the State's concern), together with the absence of any independent evidence of its prior existence, tends to support the State's contention that it was specifically crafted as an after-the-fact attempt to legitimize an otherwise disallowable expenditure. As such, it cannot be permitted to justify prior actions, even when there is no indication that these prior actions were taken in bad faith.

For the reasons stated by the ALJ, however, the Commissioner does find the present policy acceptable on its face, so that related expenditures incurred after its February 11, 1988 adoption would be fully allowable provided that they are not inequitably distributed or otherwise precluded by law.*

Accordingly, the initial decision of the Office of Administrative Law is reversed on the issue of the disputed insurance payment, and the excess cost of Mr. Eccleston's additional benefit prior to February 11, 1988 is hereby disallowed for tuition rate setting purposes pursuant to N.J.A.C. 6:20-4.4(a)17. With respect to those issues addressed by settlement, the Commissioner accepts the settlement terms and adopts them as his final decision in this matter, subject to compliance by the parties.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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* For example, it is noted that another employee will meet the stated criteria for additional insurance coverage in approximately one and one-half years. Should that employee receive a benefit less than Mr. Eccleston's, the excess cost of Eccleston's benefit would once again be disallowable under the regulations as they now exist.

PINELAND LEARNING CENTER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, February 8, 1990

For the Petitioner-Appellant, James J. Seeley, Esq.

For the Respondent-Respondent, Arlene G. Lutz, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

We deny Appellant's motion to supplement the record, and, for the reasons expressed by the Administrative Law Judge, we find that the cost to Pineland Learning Center of a life insurance policy for the Center's Director was improperly disallowed by the Department of Education when it monitored the Center in 1988. Therefore, we reverse the decision of the Commissioner.

Robert A. Woodruff abstained, having recused himself from the deliberations in this matter.

June 6, 1990

BOARD OF EDUCATION OF THE TOWNSHIP OF VERONA, ESSEX COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE INTERSCHOLASTIC ATHLETIC ASSOCIATION, RESPONDENT.	:	DECISION

For the Board, Harris, Dickson, Buermann, Camp, Ashenfelter, Slous & Boyd (George H. Buermann, Esq., of Counsel)

For Respondent NJSIAA, Hannock Weisman (Michael J. Herbert, Esq., of Counsel)

This matter comes before the Commissioner by way of Petition of Appeal with a Request for Emergent Relief filed on February 7, 1990 by petitioner (hereinafter the Board) seeking reversal of a determination of the New Jersey State Interscholastic Athletic Association (hereinafter NJSIAA) Executive Committee (hereinafter Committee) disqualfying the Verona Ice Hockey Team from competing in the State Ice Hockey Championship, due to an alleged violation by Mr. J.B., a volunteer assistant ice hockey coach, duly appointed by the Board, of NJSIAA Rule 2, Section 11 (See NJSIAA Handbook, at pp. 73-74) which prohibits instruction of student-athletes or the conduct of practice sessions by their coaches during the off season. Although the petition originally sought emergent relief prior to February 9, 1990, the date set for seeding the participating championship teams, NJSIAA has arranged for two alternative seedings to be prepared, allowing the Commissioner to respond to the application by Wednesday, February 14, 1990, the date scheduled for the competition, rather than by February 9, 1990.

The pertinent rules governing out-of-season play are set forth in pertinent part, below:

> Section 11. Out-of-season Period. Out-of-Season practice is not permitted under the direction of an instructor or coach, or student leaders. This eliminates any kind of equipment except shoes as noted, under any form of instruction. The object of this explanation is to make clear the point that there shall be absolutely no practice during the out-of-season period for a particular sport. Any subterfuge or "sharp practice" shall be construed as a violation of this rule.

> Penalty - any school proved guilty of violating the above rules shall be placed on probation by the Association for not less than one year from the date of violation, and shall not receive championship recognition from this Association in that sport, or enter any championship games, matches, meets or tournaments sponsored by the Association in that sport. Conditions of probation are outlined by Bylaws, Article X, Section 2.A. Probation. (emphasis supplied) (NJSIAA Brief, at p. 3, citing Handbook at pp. 73-74)

Specifically, the Committee determined that C.B., Mr. J.B.'s son and a member of both the Verona Ice Hockey Team and the Montclair Bantams, a year-round hockey team club, was coached by Mr. J.B. on both teams, during the months of October and November 1989, in violation of Rule 2, Section 11 of the NJSIAA regulations. Said regulations mandate a minimum penalty of a one-year probation and a disqualification of the member team from championship consideration in that sport. It is uncontested herein that Mr. J.B. did coach the Bantam team during the months of October and November 1989, before practice began for the Verona Ice Hockey Team on November 15, 1989. (See memo from Mr. J.B. to Mr. Doug Gaffney, Athletic Director, Exhibit A, NJSIAA Appendix.) Neither is it disputed that Mr. J.B. serves as a volunteer assistant coach for the Verona Ice Hockey Team.

Although the Board did not submit a brief in accompaniment with its Petition of Appeal, it did submit a letter to the Director of the Bureau of Controversies and Disputes dated February 7, 1990, filed February 8, 1990, calling the Commissioner's attention to his decision in the matter of the Board of Education of the South Orange-Maplewood School District, Essex County v. NJSIAA, decided by the Commissioner November 20, 1986. Said letter is duplicated herein in its entirety:

> In that case, the Commissioner determined that the petitioner did, in fact, violate the out-of-season rules but reversed the penalties imposed by the NJSIAA as the Commissioner found that the violations "which occurred in this matter were essentially indiscretions of members of the coaching staff over which the varsity team members who participated in the recreation program had no control nor could they be aware that they were parties to a rule violation. .., the rule violation that occurred being so inconsequential in scope clearly did not result in any athletic advantage to the Columbia High School soccer team which is precisely what the out-of-season rules are designed to prevent. To acknowledge that the consequence of what the rule is designed to prevent did not occur and then to proceed to extract the extreme penalty required

> by Rule 2, Section 11 is, in the Commissioner's view, insupportable." Pages 12 and 13 of the decision.
>
> Petitioner respectfully submits that the factual circumstances of the case under consideration are similar to those of the Board of Education of the South Orange-Maplewood School District case and that it would be appropriate for the Commissioner to modify the sanctions imposed on the Verona High School Hockey Team by the New Jersey State Interscholastic Athletic Association.
>
> (Letter, at pp. 1-2)

The Petition of Appeal adds that Rule 2, Section 11 of the NJSIAA rules relating to the out-of-season period was not intended to prohibit a father from participating in a club hockey program as a coach where his son was a member of the club team under circumstances where the father-coach later served as a volunteer assistant coach of a high school hockey team of which the son of said assistant coach was a member. It argues that a father coaching a club team on which his son is the only high school team member participating is not a "coach instructing student-athletes during the out-of-season period." (Petition of Appeal, at p. 4, quoting NJSIAA Rule 2, Section 11)

The Board seeks a ruling that Paragraph 11 was not violated by the above activity, or in the alternative, seeks a determination that the penalty of the Committee is unnecessarily severe and should be modified to a letter of censure clarifying that in the future no father-coach of an off-season club team may serve in any coaching capacity for a school team coming under the auspices of the NJSIAA.

The Petition of Appeal further argues that in violation of Article XIII, Section 5 of the NJSIAA Bylaws, the instant decision of NJSIAA was made by the Executive Committee and not by the Controversies Committee, hereby denying petitioner due process of law.

By way of reply, NJSIAA submitted on February 8, 1990 a letter brief presenting its arguments in rebuttal to the Petition of Appeal in this matter.

It argues "THE COMMISSIONER SHOULD NOT DISTURB THE DETERMINATION BY THE NJSIAA WHICH IS COMPLETELY CONSISTENT WITH ITS RULES AND REGULATIONS."

NJSIAA first claims that pursuant to its Bylaws and Handbook, the Board is bound by the rules and regulations of the Association as a member of it. It cites N.J.S.A. 18A:11-3 in this regard.

Moreover, NJSIAA contends that until 1986, in South Orange-Maplewood, supra, the Commissioner has uniformly rejected attempts by member schools to gain entrance to post-season

tournament play in a variety of sports, where it had been found there was (a) a violation of any bylaw or regulation of the Association and (b) there has been an opportunity for a fair hearing. It cites the following cases in support of this proposition:

> ***Board of Education of Northern Highlands Regional High School District v. NJSIAA, decided November 28, 1982 (Exhibit H); Board of Education of the Northern Highlands Regional High School District v. NJSIAA, New Jersey Superior Court, Appellate Division, Docket No. A-5857-82T2, decided October 17, 1984 (Exhibit I); The Board of Education of the Greater Egg Harbor Regional High School District, Atlantic County v. NJSIAA, OAL Docket EDU 88-83, decided April 12, 1983 (Exhibit J); Board of Education of North Arlington School District, et al v. NJSIAA, OAL Docket No. EDU 1369-83, decided November 16, 1983 (Exhibit K); Northern Burlington Regional High School Board of Education v. NJSIAA, et al, Docket No. 359-84, (Exhibit L); Cliffside Park Public High School District, Bergen County v. NJSIAA, Docket No. 360-84, (Exhibit M); Hunterdon Central High School Board of Education v. NJSIAA, et al., Docket No. 370-85, (Exhibit N). (NJSIAA Brief, at p. 5)

As to the Board's reliance on South-Orange Maplewood, supra, for the proposition that the Commissioner should permit the team to play, NJSIAA recites the following later history of the South Orange-Maplewood case, which overturned the Commissioner's decision and ultimately upheld NJSIAA's rule, thus, denying South-Orange Maplewood's participation in the soccer championship in 1986:

> ***In November, 1986, the NJSIAA Executive Committee determined that the Columbia High School soccer coaching staff in South Orange-Maplewood, Essex County, had engaged in out of school coaching and, thereby eliminated the high school from the on-going State soccer championship, pursuant to Rule 2, Section 11. An emergent appeal was then taken to the Commissioner of Education, who sustained the rule, but nonetheless reversed the NJSIAA as it related to the championship disqualification penalty. (See Board of Education of South Orange-Maplewood School District, Essex County v. NJSIAA, Docket No. 379-11/86, decided November 20, 1986 (Exhibit C)). On the very day that the Commissioner issued that decision, the NJSIAA appealed to the Superior Court, Appellate Division, to stay his Order, directing the inclusion of Columbia High School. After arguments were heard by a full panel of the Appellate Division, consisting of Judges Antell,

Long and D'Annunzio, that Appellate panel issued such a stay (Exhibit D). A further appeal was then taken to the Supreme Court by South Orange-Maplewood. After briefs and arguments were made to Justice Alan B. Handler, pursuant to R. 2:9-8, that Supreme Court Justice determined not to stay the Order of the Appellate Division. Based upon the contemporaneous notes taken of a telephone colloquy with Justice Handler on November 21, he denied relief to Columbia on the following basis:

> 1. As a single member of the Supreme Court, he was reluctant to overturn a full panel of the Appellate Division which conscientiously reviewed the record.
>
> 2. He could not determine that the Appellate Division's decision was arbitrary and was greatly influenced by that Court's decision.
>
> 3. He had a strong sympathetic reaction in dealing with the role of the Commissioner in his interpretation of school law and usually defers to the responsible governmental agency. However, the Commissioner of Education had adopted the rules and regulations of the Association and all the schools, teams and athletes were advised to abide by those rules. The Commissioner of Education accepted the scheme in which the rules were rigid and what was expected of them. The Commissioner had several cases before this dispute which involved football and soccer players being removed from the games and the Commissioner enforced such harsh treatment and did not seek to change these rules. The Commissioner's decision in this matter is ad hoc and inconsistent with earlier upholding of rules. (Exhibit E)***
>
> (NJSIAA Brief, at pp. 3-4)

Further, NJSIAA contends the school principal and all of the coaches, including the ice hockey coach, signed an Affidavit certifying that they were aware of the eligibility and other rules of NJSIAA. Also, after providing the Board notice of its determination to apply the penalty attached to the Rule in question, a full hearing was given to it by the Committee on January 11, 1990, the transcript of which it submits for the Commissioner's consideration of this matter. It further submits that the Board itself acknowledged that there had been a violation of the rule, although NJSIAA presents no citation in the record in support of

this contention. Finally, NJSIAA argues a full debate on the record was conducted by the Committee, resulting in the determination that the minimum penalty for an out-of-season violation would be imposed.

NJSIAA summarizes its position by stating:

> In the face of the determination by the Commissioner in the South Orange-Maplewood case sustaining the rule, the only claim made by the Petitioner herein is that the penalty is too severe. It must be respectfully pointed out that in each one of the seven cited cases brought by various schools, seeking championship qualification, the identical argument was made and rejected by either the Commissioner or the Courts. When Verona joined the NJSIAA and when its coaches and administrators thereafter signed the Affidavit acknowledging an awareness of the rules and regulations of the Association, that school became bound by those very rules. Although the Commissioner may disagree with the application of those rules, it is respectfully submitted that he is precluded from substituting his judgment for that of the NJSIAA merely because he believes that the application of the rule is too harsh." (Id., at pp. 7-8)

NJSIAA urges that the petition be dismissed and the action of NJSIAA disqualifying the Verona Ice Hockey Team from the State championship be affirmed.

Upon his careful and independent review of the record of this matter, including the transcript of the Committee hearing held on January 11, 1990, the Commissioner adopts as him own the determination of NJSIAA disqualifying the Verona Ice Hockey Team from the State championship for the reasons expressed by the Committee and for those reasons expressed in the brief submitted by NJSIAA dated February 8, 1990.

It is first noted that the Commissioner's review of the NJSIAA matter is governed by such cases as B.C. v. Cumberland Regional School District, 220 N.J. Super. 214, 234 (1987) and Pascack Valley Regional High School District v. NJSIAA, decided by the Commissioner August 19, 1987. It is not the Commissioner's role in reviewing a matter brought before him pursuant to N.J.S.A. 18A:11-3 to substitute his judgment for the Association's unless compelling reasons are provided in the record for him to do so. See R.S.R. v. NJSIAA et al., decided by the Commissioner November 13, 1986. The instant record reveals no such compelling circumstances warranting reversal of the determination made by the Committee, the final internal appeal mechanism of NJSIAA pursuant to its Bylaws, Rules and Regulations.

In so concluding, the Commissioner is particularly persuaded by the similarity of this matter to those facts extant in the South Orange-Maplewood case. The Commissioner acknowledges as

accurate the recitation of the history of that case as set forth in NJSIAA's Brief dated February 8, 1990. While sensitive to the good intentions with which the Board claims assistant coach J.B. undertook his coaching duties for both teams, nevertheless, by permitting his son the obvious advantage of his coaching before the regulation high school season at a private club, Verona's team was presented with a clear athletic advantage and a clear violation of Rule 2, Section 11. It must be borne in mind that the coaching C.B. received was not backyard tips from his father, but formal team competition and coaching, as such, the evil sought to be avoided in the promulgation of the NJSIAA rule was realized.

Especially in light of Justice Handler's comments in determining not to order a stay of the Appellate Division's stay of November 21, 1986 in the South Orange-Maplewood case, and with full cognizance of the precedent set in similar petitions seeking reversal of the Committee's interpretation of its rules concerning post-season tournament play, the Commissioner finds and determines that the Board has failed in bearing its burden of persuading him of any arbitrary action on NJSIAA's part warranting reversal of the Association's determination on the merits of the appeal.

Moreover, the Commissioner is likewise unpersuaded that imposition of the minimal penalty as set forth in Rule 2, Section 11 was too severe. By agreeing to be bound by NJSIAA's rules as a member of the Association, The Board agreed to the minimal penalty for violation of Rule 2, Section 11, elimination from any post-season championship competition.

Finally, the Commissioner rejects the Board's contention that it was denied due process in that the Committee represents the final internal appeal process within NJSIAA.

Accordingly, the Request for Stay of the NJSIAA's determination is denied; and for the reasons expressed above, the instant Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

EDWARD P. MIGLIACCIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	ORDER
RESPONDENT.	:	
	:	

For the Petitioner, Segreto & Segreto (James V. Segreto, Esq., of Counsel)

For the Respondent, Gerald L. Dorf, P.C.

This matter has arisen by way of a Petition and Order to Show Cause submitted by counsel for Petitioner Edward P. Migliaccio on December 6, 1989. By letter dated December 12, 1989, the Director of the Bureau of Controversies and Disputes informed petitioner's counsel that the claim raised in his Order to Show Cause is not amenable to that procedure set forth at N.J.A.C. 6:24-3.1(a), but that the Commissioner would consider the matter as one brought as a Petition of Appeal with Motion for Interim Relief pursuant to N.J.A.C. 6:24-1.5.

On December 12, 1989 counsel for the Board submitted a letter statement of Position to the Petition and Motion of Petitioner. By letter dated December 20, 1989 the Commissioner acknowledged receipt of the above documents denied emergent relief for failure to meet the standards set forth in Crowe v. De Gioia, 90 N.J. 126 (1982) and directed the parties to address the issue of whether petitioner's rights had been violated.

On January 2, 1990, the Board filed an Answer to the Petition of Appeal and Motion for Emergent Relief. On January 4, 1990 petitioner submitted a letter brief in response to the directive of the Commissioner in his letter of December 20, 1989. On January 4, 1990, petitioner filed a Supplemental Petition of Appeal with Motion for Emergent Relief. On January 18, 1990, the Board filed an Answer to Supplemental Petition and Motion. On January 19, 1990, the Board submitted its reply brief in response to the directive of the Commissioner in his letter dated December 20, 1989.

Petitioner contends that the action of the Board herein in suspending petitioner is illegal because it violated the Open Public Meetings Act (hereinafter OPMA) and also because said action violated N.J.S.A. 18A:6-14. Petitioner avers that at the time of each of the two suspensions with pay, the first occurring on November 12, 1989, the second occurring as a continuation of said

suspension on December 14, 1989, said suspensions removed petitioner from his tenured employment as secretary/business administrator in respondent's district absent tenure charges having been filed or certified to the Commissioner.

At Point I of his brief, petitioner avers that he did not receive notice pursuant to N.J.S.A. 10:4-12 of the OPMA of the Board's intention to go into executive session, nor was he given an opportunity to make the demand that the matter of his suspension be discussed at a public meeting. Citing N.J.S.A. 18A:6-11 wherein it states that "[t]he considerations and actions of the board as to any charge shall not take place at a public meeting," petitioner contends that statute is only applicable where charges have been made against an employee under tenure and all other provisions of the Tenure Employees Hearing Law pertaining to the filing of a certification of tenure charges have been followed. Petitioner claims that it is

> that consideration and deliberation provided for in N.J.S.A. 18A:6-11 which is required to be conducted in private session. That statute has no application to the meetings of the Board at which it suspended, since no charges had been made and no opportunity had been given to the Petitioner to submit his written statement of position and written statement of evidence in response thereto.
> (Petitioner's Brief dated January 4, 1990, at p. 3)

Citing Cirangle v. Maywood Board of Education, 164 N.J. Super. 595 (Law Div. 1978), petitioner acknowledges that the judge presiding in Cirangle held that N.J.S.A. 18A:6-11 takes precedence over N.J.S.A. 10:4-12, but claims that the action of the Board in going into executive session to discuss petitioner's suspension without charges having been made and certified to the Commissioner does not bring the meeting within the purview of N.J.S.A. 18A:6-11. Accordingly, petitioner argues, the Board is in violation of the OPMA.

At Point II of his brief, petitioner argues that the instant suspensions without charges have been made and certified in violation of N.J.S.A. 18A:17-2 and N.J.S.A. 18A:6-14. Petitioner claims that N.J.S.A. 18A:17-2 provides the specific procedure for disciplinary action against a secretary/business administrator, and that said statute provides that he may only be disciplined by following the dictates of N.J.S.A. 18A:6-9 et seq. Petitioner avers that contrary to the position taken in the Commissioner's letter of December 20, 1989, the provisions of N.J.S.A. 18A:6-8.3 are not a part of N.J.S.A. 18A:6-9 et seq. and, therefore, are not applicable to the suspension of a secretary/business administrator. Rather, petitioner suggests, the dispositive statute dealing with the circumstances under which a tenured secretary/business administrator may be suspended is N.J.S.A. 18A:6-14, which language applies both to a suspension "with or without pay." (Petitioner's Brief, at p. 4, quoting N.J.S.A. 18A:6-14) Thus, petitioner submits, since no charges were filed or certified against him at the time of either suspension, said suspensions are illegal.

At Point III, petitioner avers that the fact that he has been suspended with pay does not mean that he has not sustained and does not continue to sustain irreparable injury. He claims he has been suspended and deprived of the occupancy and the enjoyment of his tenured position since November 12, 1989 with no charges having been made against him. Citing numerous federal district court cases and two United States Supreme Court cases, petitioner argues that "***a tenured public employee of the State of New Jersey has protectable property rights in his tenured position and the benefits, emolument as well as the exercise of the prerogatives of the office itself." (Id., at p. 5) The deprivation of such rights, absent charges having been made against him, are per se irreparable invasions of his rights, he claims. The fact that he is continuing to receive his pay does not diminish the irreparable nature of the injury to and the deprivation of the benefit and occupancy of his tenured position. Petitioner claims:

> ***The Board has had abundant time to make charges, if there are charges which are appropriate to be made. They should be constrained to act in accordance with the applicable provisions of law. They have failed to do so. The Constitutionally protected as well as statutorilly (sic) protected rights of the Petitioner have been clearly violated, and the continued violation should not be further countenanced. (Id., at p. 6)

Petitioner seeks an Interim Order from the Commissioner directing his immediate reinstatement.

By way of reply, the Board at Point I of its brief states that as petitioner was suspended with pay, he has no recognized property interest in the continuation of active employment. It concedes that N.J.S.A. 18A:17-2 requires that before removal of a tenured school board secretary or business administrator may occur, the procedural protections of the Tenure Employees Hearing Law, N.J.S.A. 18A:6-9 et seq., must be followed. However, the Board claims, petitioner has not been removed or dismissed or suffered loss of pay but, instead, has been merely suspended with pay.

The Board acknowledges that a public employee's interest in his continued employment may be a property interest entitling him to claim federal due process protection. Citing Bishop v. Wood, 426 U.S. 341, 344 (1976), the Board submits, however, that the determination as to whether a property interest in employment has been created must be decided by reference to State law. The Board claims that those decisions cited by petitioner in his Letter Brief address the loss of employment by way of termination or discharge. Again, the Board claims petitioner herein has not been terminated or discharged, but rather has been suspended with pay. The Board adds:

> ***Moreover, by reference to such decisions, which are constitutional civil right cases and not property right cases, Petitioner would lead one to believe that he shares a common bond or community of interest with minorities, peaceful

> demonstrators, peaceable assemblies, protected qualified handicaps, welfare recipients or anyone else asserting the protection of rights guaranteed under the First and Fourteenth Amendments to the U.S. Constitution. However, as he does not have, nor can he demonstrate a civil right to protect, he does not stand in such company. Instead, as was stated by the U.S. Supreme Court, he must demonstrate, not a civil right protected by the U.S. Constitution, but a protected property interest defined independently of the U.S. Constitution. Board of Regents v. Roth, 408 U.S. 564 (1972). He has not heretofore made any such showing.
>
> (Board's Reply Brief, at p. 6)

Further, relying on the United States Supreme Court cases entitled Cleveland Bd. of Education v. Loudermill, 470 U.S. 532 (1985) and Arnett v. Kennedy, 416 U.S. 134 (1974) the Board relies on the balancing of competing interests spoken of in Arnett between the employee's interest in retaining employment versus the public employer's interest in a) removing an unsatisfactory employee expeditiously, b) avoiding administrative burdens, and c) avoiding risk of erroneous terminations to suggest that it has important interests in not being compelled to reinstate an employee who has been suspended. It cites Southern Ohio Coal v. Donovan, 774 F. 2d 693, 703 (6th Cir. 1985) quoting Arnett in support of this contention stating an "unsatisfactory employee can adversely affect discipline and morale in the workplace, foster disharmony and ultimately impair the efficiency of an office or agency."

As to petitioner's claims of constitutional due process to a property right violation, the Board avers these arguments are also misplaced because he has not reached the status of a dismissed employee entitled to such protection. Rather, claims the Board, he is suspended with pay which, it claims, is a situation approved by the decision in Loudermill, supra, wherein the Supreme Court states:

> Finally, in those situations where the employer perceives a significant hazard in keeping the employee on the job, it can avoid the problem by suspending with pay.

Citing Shawgo v. Spradlin, 701 F. 2d 470 (5th Cir. 1983) and N.J.S.A. 18A:6-8.3, the Board avers that "the post-suspension procedural protections provided under N.J.S.A. 18A:6-9 et seq. are sufficient against arbitrary imposition of suspensions especially as N.J.S.A. 18A:6-8.3 specifically mandates the continued payment of wages during such period of suspension." (Reply Brief, at p. 10)

The Board also claims petitioner has not cited any cases in support of his claim for a return to work since there is no fundamental property right to merely work at a job in the public sector while getting paid. Thus, it claims, there is no legal basis warranting the reversal of the suspension of petitioner with pay, and the Commissioner should deny emergent relief.

At Point II of its reply, the Board avers petitioner's suspension is not in violation of N.J.S.A. 18A:17-2 nor of N.J.S.A. 18A:6-14. It relies on Romanowski v. Bd. of Ed. of Jersey City, 89 N.J. Super. 38 (App. Div. 1965) for the proposition that N.J.S.A. 18A:6-9 et seq. did not apply when a school board suspended its indicted business manager without pay pending disposition of the indictment. It further avers that N.J.S.A. 18A:6-8.3 enacted in 1971 to be effective in 1972, is not superseded by N.J.S.A. 18A:6-9, as petitioner would suggest, "but is clearly part thereof requiring the conclusion to be drawn that the term 'suspension' as used in N.J.S.A. 18A:17-2 pertains only to a suspension without pay." (Id., at p. 13) Thus, it claims, petitioner's suspension with pay is lawful and in compliance with N.J.S.A. 18A:6-8.3.

At Point III of its reply brief, the Board contends there has been no violation of N.J.S.A. 10:4-12, of the OPMA. The Board denies petitioner's allegation that when a tenured employee is suspended the employee is entitled to have any such discussion of the matter held in public session.

The Board, in rebuttal states:

> To accept such an erroneous contention as is made by Petitioner is to grant an unharmed employee suspended with pay more rights than an employee against whom charges and a statement of evidence have been filed as that employee can be suspended without pay and without a public session of the Board of Education (see N.J.S.A. 18A:6-14).
> (Id., at p. 14)

Moreover, the Board relies on Cirangle v. Maywood Board of Education, 164 N.J. Super. 595 (Law Div. 1979) for the proposition that public access is due an employee when probable cause is found to exist to substantiate the charges against the employee, but that no due process is due before then. Citing D'Ippolito v. Maguire, 33 N.J. Super. 477 (App. Div. 1955), the Board submits that an employee merely suspended with pay is not so harmed. Finally, it avers that if the Legislature of the State of New Jersey had intended the suspension permitted under N.J.S.A. 18A:6-8.3 to be accorded the same hearing procedures as dismissals or removals, it would have made that known when it enacted the statute. It cites Spinelli v. Immanuel Congregation, 118 Ill. 2d 389, 2 IER Cases 1129, 1134 (Ill. Sup. Ct. 1987) for this proposition. Thus, the Board contends, there was no violation of N.J.S.A. 10:4-12, and the Petition for Emergent Relief should be denied.

At Point IV of its reply brief, the Board submits that petitioner has no standing to complain of any adverse employment action taken against him by the Board. Citing N.J.S.A. 18A:17-14.1, the Board contends the appointment of petitioner as secretary/business administrator was never agreed to by the Passaic County Superintendent of Schools nor approved by the New Jersey Commissioner of Education, nor by the State Board of Education, in contravention of the statute above. Inasmuch as the appointment of petitioner as secretary/business administrator was not approved in the manner provided for in N.J.S.A. 18A:17-14.1, his appointment is

void ab initio, claims the Board, and he cannot be heard to complain of any adverse employment taken against him with respect to it. Thus, the Board claims, the application for emergent relief is moot.

Said statutory provisions speak to the creation of the position of school business administrator in a district(s). Therefore, no such approval is required from the county superintendent, Commissioner or State Board upon each or any subsequent appointment of an individual to serve in said position.

Upon his careful and independent review of the papers filed in the instant matter, the Commissioner denies the emergent relief sought by petitioner for failure to meet the standards for pendente lite restraints as set forth in such cases as Crowe v. De Gioia, 90 N.J. 126 (1982).

First, petitioner has failed to demonstrate a likelihood of prevailing on the merits of the matter raised in this case. N.J.S.A. 18A:6-8.3 reads as follows:

> 18A:6-8.3. Suspended employee or officer of board of education; compensation; exceptions
>
> An employee or officer of a board of education in this State who is suspended from his employment, office or position, other than by reason of indictment, pending any investigation, hearing or trial or any appeal therefrom, shall receive his full pay or salary during such period of suspension, except that in the event of charges against such employee or officer brought before the board of education or the Commissioner of Education pursuant to law, such suspension may be with or without pay or salary as provided in chapter 6 of which this section is a supplement.*** L.1971, c. 435, Sec. 1, eff. Feb. 10, 1972.

At the outset of his review of this matter, the Commissioner rejects Point IV above as being entirely without merit. N.J.S.A. 18A:17-14 states:

> 18A:17-14.1. Appointment of school business administrators; may act as secretary; duties, etc.
>
> A board or the boards of two or more districts may under rules and regulations prescribed by the state board, appoint a school business administrator by a majority vote of all the members of the board, define his duties, which may include serving as secretary of one of the boards, and fix his salary, whenever the necessity for such appointment shall have been agreed to by the county superintendent of schools or the county superintendents of schools of the counties in which the districts are situate and approved by the commissioner and the state

board. No school business administrator shall be appointed except in the manner provided in this section. L. 1967, c. 271, sec. 18A:17-14.1, eff. Jan. 11, 1968.

It is clear that N.J.S.A. 18A:6-8.3 was promulgated by the Legislature after N.J.S.A. 18A:17-2. That fact coupled with the plainfaced language of N.J.S.A. 18A:6-8.3 makes clear the legislative intent that all employees or officers of the board of education are subject to paid suspensions, where warranted. Said language must be construed in pari materia with other statutes defining roles of board employees, such as N.J.S.A. 18A:17-2, which speaks to tenure of secretaries, assistant secretaries, school business administrators, business managers and secretarial and clerical employees. Thus, N.J.S.A. 18A:17-2 must be read to harmonize with the legislative intent of N.J.S.A. 18A:6-8.3 that all employees be subject to the possibility of being suspended with pay "pending any investigation, hearing or trial, or any appeal therefrom.***" Because N.J.S.A. 18A:6-8.3 was promulgated after N.J.S.A. 18A:17-2, it follows that had the Legislature wished to exclude secretaries/business administrators from application of N.J.S.A. 18A:6-8.3 to all employees, it would have so stated.

It is well established the meaning of a statute first must be sought in the language of the statute. Sheeran v. Nationwide Mut. Ins. Co., Inc., 80 N.J. 548 (1979) If the language of a statute is clear and unambiguous on its face, we may not go beyond the words of the statute in order to devine the Legislature's intent. State v. Butler, 89 N.J. 220 (1982) In such cases, the language of the statute is the full expression of what the Legislature intended, and, although legislative history may be utilized to provide reassuring confirmation of literally apparent meaning, e.g., Gauntt v. City of Bridgeton, 194 N.J. Super. 468 (App. Div. 1984), extrinsic materials may not be used to create ambiguity or to determine that the Legislature intended something other than that which it actually expressed. Safeway Trails, Inc. v. Furman, 41 N.J. 467, (1964), appeal dismissed and Cert. denied, 379 U.S. 14; Gauntt v. City of Bridgeton, supra We find that the words of the statutes involved here are clear and unambiguous, and that application of the language of each neither results in conflict between them nor leads to absurd or anomalous results. Robson v. Rodriguez, 26 N.J. 517 (1958) The Commissioner so concludes having full awareness of N.J.S.A. 18A:6-10 et seq., the Tenure Employees Hearing Law, which permits boards of education to suspend a tenured employee either with or without pay after the certification of tenure charges to the Commissioner, a condition which has not taken place in the instant matter. The Commissioner concludes therefore that petitioner is in error to suggest that he or any tenured employee may be suspended only upon the Board's invoking N.J.S.A. 18A:6-10 et seq.

Moreover, because petitioner has been merely suspended with pay, not dismissed from his tenured position, he fails to meet the second leg of the Crowe v. De Gioia, supra, standards for emergent relief, that of irreparable harm. In fact, he has suffered no monetary loss at all. Moreover, the Commissioner rejects

petitioner's contention made in reliance on federal civil rights cases, that the deprivation of a protectable civil right is, in itself, sufficient reason for preliminary injunctive relief. The property right petitioner seeks to protect in this matter is to "his tenured position and the benefits, emolument as well as the exercise of the prerogatives of the office itself." (Petitioner's Brief, at p. 5) While the Commissioner agrees with both parties that petitioner may have a protectable property interest in his employment as secretary school business administrator, his entitlement to said position at this juncture is not in jeopardy since he has not been dismissed from said position, nor have tenure charges been filed against him. Rather, he has been merely suspended with pay. In so stating, the Commissioner is sensitive, however, that any such suspension with pay levied against a tenured employee may not be continued indefinitely in derogation of the employee's tenure rights. Rather, as suggested by N.J.S.A. 18A:6-8.3, the intendment of any paid suspension is to conduct an investigation, hearing or trial, absent the filing of tenure charges or, perhaps, to await disposition of an indictment. See Bonnie Sergiacomi Gandy v. Board of Education of the Township of Fairfield, Cumberland County, decided by the Commissioner May 25, 1982, aff'd State Board September 10, 1982.

Concerning petitioner's allegation that the Board violated N.J.S.A. 10:4-12 of the OPMA, the Commissioner has carefully perused the record for indication of whether the topic of petitioner's employment is acknowledged as having been discussed by the Board at any of its meetings to date, be it an open or a closed session. In a letter dated December 11, 1989, from Board counsel to petitioner's counsel it is stated at paragraph 5:

> For your information, the issue of possible charges concerning your client will be a topic on the closed session agenda of the Board of Education meeting to be held Thursday, December 14, 1989.

No other indication appears in the record to persuade the Commissioner whether petitioner had been the topic of discussion at any earlier Board meeting. Concerning the December 14, 1989 closed session, the Commissioner finds the language of N.J.S.A. 18A:6-11 helpful. Therein it is stated pertaining to procedures to be followed under the Tenure Employees Hearing Law:

> The considerations and actions of the board as to any charge shall not take place at a public meeting.

Petitioner contends that because the Board was considering whether to suspend him with pay, not whether to file or certify tenure charges, he is entitled to have the discussions of his suspension held in public session, pursuant to N.J.S.A. 10:4-12. The Commissioner disagrees. The letter of December 11, 1989 makes plain that the Board intention at its closed session held on Thursday, December 14, 1989 was to consider "the issue of possible charges" against petitioner. (Letter dated December 11, 1989)

Clearly, N.J.S.A. 18A:6-11 supersedes N.J.S.A. 10:4-12 by foreclosing the Board from publicly airing consideration of charges against its employees pursuant to the Tenure Employee Hearing Law. See Cirangle, supra. Although no such charges have as yet been levied or certified to the Commissioner, deliberations, "considerations and actions" pertinent to the Tenure Employees Hearing Law, whether having taken place in November or December of 1989, are not subject to public meetings. The Commissioner so finds.

In the instant matter, petitioner's paid suspension has already endured more than two full months. The record before the Commissioner provides no specific indication of why the Board elected to suspend petitioner originally in November of 1989, nor why in December of 1989 it elected to continue that suspension to date. The intent of the law pertaining to suspensions with pay, as expressed in N.J.S.A. 18A:6-8.3 is clear, however, that any such paid suspension against a tenured employee of a school district may not be continued indefinitely, both as a check against spending public funds for services not rendered and because it would be in contravention of the intent of tenure law to suspend indefinitely.

Therefore, petitioner's request for emergent relief is denied, but the Board herein is directed that it must, within sixty (60) days of the date of the within Order, conclude such investigation it may be conducting into petitioner's employment with the district as secretary/business administrator and/or take such actions as may be required pursuant to N.J.S.A. 18A:6-10 et seq. Should particular circumstances which prevail in this matter prevent the Board from taking the action directed by the Commissioner herein, it is to inform him why it has been unable to conform with his directives by letter. Therefore, the Petition of Appeal is dismissed. However, should the Board fail to conform with these directives, then petitioner is not precluded from renewing the instant petition.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

IN THE MATTER OF THE ATHLETIC	:	
ELIGIBILITY OF B.P., MILLBURN	:	COMMISSIONER OF EDUCATION
TOWNSHIP SCHOOL DISTRICT, ESSEX	:	DECISION
COUNTY.	:	
	:	

For the Petitioners, Riker, Danzig, Scherer & Hyland (John J. Farmer, Jr., Esq., of Counsel)

For the Respondent, Hannoch Weisman (Michael J. Herbert, Esq., of Counsel)

This matter has arisen by way of Petition of Appeal together with an Application for Emergent Relief filed on January 8, 1990 seeking to reverse the New Jersey State Interscholastic Athletic Association (NJSIAA) Eligibility Appeals Committee (hereinafter EAC) decision of December 6, 1989. Said decision denied a waiver of Article V, Section 4E of the NJSIAA Bylaws, requiring a student to satisfactorily complete 25% of the credits required for graduation during the immediately preceding year, and Article V, Section 4J, limiting athletic participation for the first eight semesters after the entrance of a student into high school.

The parties were instructed by the Director of the Bureau of Controversies and Disputes of the New Jersey State Department of Education to submit briefs on the issues brought before the Commissioner pursuant to his authority under N.J.S.A. 18A:11-3 to hear appeals once a petitioner has exhausted the NJSIAA internal appeals procedures. Petitioners' brief was received timely on January 12, 1990. The NJSIAA's reply brief was timely received on January 22, 1990.

Petitioner B.P., a student at Millburn High School, through his guardian ad litem, S.P., seeks a waiver of both the academic credit rule and the eight semester rule, as a result of his having chosen, with his family's consent but without sponsorship through an approved foreign student exchange program, to live with a family in Finland from August 1988 until June 1989. While there, he attended a Finnish High School and participated in a community-sponsored hockey program while interacting culturally and socially. However, no course credits were transferred from the Finnish High School, and B.P. is repeating his junior year at Millburn High School.

Petitioners do not question that B.P. falls within the literal parameters of both the academic credits rule and the eight semester rule. (See Petitioners' Brief, at p. 2) Neither do petitioners challenge the rules on face; they admit that "***both rules are designed to ensure that student athletes are remaining in school competing against their peers." (Id.) However, petitioners

do argue that the salutary purposes of these rules will not be effectuated by application to B.P.'s case but, rather, would unfairly punish his initiative and scholarship. They claim that:

> Because application of the rules to B.P. not only fails to effectuate those rules' purposes, but also stifles qualities that the educational system should nurture, the rules should have been waived. The failure of the NJSIAA to do so can only be considered arbitrary, capricious, and unreasonable. (Id., at p. 3)

In support of these contentions, petitioners first argue that "NJSIAA's Decision Not to Waive the Eight Semester Rule Is Arbitrary, Capricious, and Unreasonable, and thus Constitutes an Abuse of Discretion." (Id., at p. 6) Petitioners cite the standard of review governing NJSIAA matters as set forth in Smith v. New Jersey Interscholastic Athletic Association, 3 N.J.A.R. 193 (1981). It cites the same case for the types of exceptions NJSIAA has recognized in the past, among which were language barriers, a year abroad spent by American exchange students, class time missed by a worthy student who withdrew to care for incapacitated parents, or when a full year was missed due to family disharmony concerning a divorce. They submit that B.P. is a worthy student, that he was in school for the entire year in a foreign county, and that he carried a normal curriculum for an exchange student including becoming fluent in a foreign language. They further suggest relying on Smith that if he had spent the year abroad through the auspices of American Friends Service Exchange Program (AFS), he would have received the waiver. Therefore, they claim, the waiver is in order in this case.

Further, petitioners rebut NJSIAA's assumption that students studying abroad without the auspices of a recognized student exchange program are not there for serious academic purposes, and that B.P. was in Finland for primarily social and athletic purposes. Rather, petitioners contend B.P. was not "'joyriding' through Europe" (Id., at p. 8), but, rather, was in school all year, having missed at most five days. They cite the transcript at page 211 in this regard. Although there is no academic transcript available from his school in Finland, petitioners aver the academic setting is similar. Thus, they aver, B.P.'s situation was much more analogous to that of an exchange student in a recognized program than to that of a teenager traveling with his parents, as NJSIAA suggests.

Petitioners argue:

> In light of his academic record, the seriousness with which [B.] takes academics should be beyond cavil, and his purpose in living in Finland for a year cannot be dismissed as "red-shirting," particularly since there could have been no such objection had [B.'s] exchange program been "recognized." At bottom, the Committee's

> procrustean decision penalizes [B.] for showing individual initiative and intellectual curiousity (sic). But for a bureaucratic seal of approval, his situation is indistinquishable from that of an AFS exchange student; a waiver should have been granted. (Id.)

Petitioners' second point is "NJSIAA's Failure to Waive the Academic Credit and Eight Semester Rules Does Not Accord with the Purpose of Those Rules, and Is Arbitrary, Capricious and Unreasonable." (Id.)

Petitioners argue that the Smith, supra, decision obliges NJSIAA to be consistent with the purposes of its rules. They claim the purposes behind the academic credit and eight semester rules, that is, the prevention of "red-shirting" and the maintenance of academic standards, are not served by the NJSIAA's decision.

> ***First, [B's] academic record is above criticism; no academic standard is threatened by allowing him to play. Second, even assuming arguendo that [B.] was "red-shirted", it is difficult to see how a policy against red-shirting will be served by forcing [B.] to lose two seasons of eligibility for having spent one season abroad -- particularly when, had [B.] been an AFS student, no such concern would have been raised. (Id., at p. 9)

Petitioner's claim, that B.P. was not red-shirted, and that he should not be blackballed now by the application of two rules that penalize him for showing the initiative to broaden his horizons. Petitioners seek reversal of the EAC ruling denying B.P. waivers of the above NJSIAA rules.

NJSIAA argues first in its brief that "NO COMPELLING REASON HAS BEEN PRESENTED TO JUSTIFY A WAIVER OF THE ACADEMIC CREDIT RULE OF THE EIGHT SEMESTER RULE." (NJSIAA Brief, at p. 6) It cites the standard of review by which the Commissioner is bound in NJSIAA matters as articulated in B.C. v. Cumberland Regional School District, 220 N.J. Super. 214, 234 (App. Div. 1987), and Pascack Valley Regional High School District, Bergen County v. NJSIAA, decided by the Commissioner August 19, 1987. It further refers, inter alia, to Smith, supra, one of two cases that resulted in NJSIAA's promulgating the EAC, which provides for the fullest due process in eligibility cases. It claims that since the adoption of the NJSIAA Bylaw changes mentioned above and its accompanying Guidelines, both the Courts and the Commissioner have refused to substitute their judgment for that of the Committee, where a hearing has been granted and a decision has been made in accordance with those promulgated standards. It submits that in this matter, petitioners have not presented any compelling reason to warrant a change in that sound administrative policy.

At Point Two of its Brief, NJSIAA contends that "No Waiver of the Eight Semester Rule Should be Granted." (Id., at p. 8)

Relying on the language of the eight semester rule as noted in the NJSIAA Handbook and the Guidelines hat accompany it, NJSIAA contends that waivers of the eight semester rule will only be granted where a student has had "to continue secondary schooling beyond the eighth semester because of the circumstances beyond the student's control." (NJSIAA Brief, at p. 10, citing the Handbook, at p. 64) NJSIAA claims the testimony is uncontrovered that B.P. went to Finland having participated in ice hockey at Millburn for two years. It also notes while in Finland, B.P. played hockey on a club team four or five times a week at a much higher competitive level for another year. NJSIAA contends the EAC took note of this fact and found that B.P.'s presence in Finland for a year was voluntary. "Thus we are presented with a case of a student who not only extended his secondary schooling on a completely voluntary basis, but continued to compete in ice hockey, doubtlessly improving his skills." (Id.) It further claims that the student's father conceded at the December 6, 1989 hearing before the EAC that he was aware of the eight semester rule but never spoke to school officials before approving his son's year abroad. Accordingly, NJSIAA argues that it acted properly in denying the waiver to allow athletic competition for an additional year after B.P.'s chronological peers had graduated from high school.

At Point Three of its Brief, NJSIAA submits that "No Waiver of the Academic Credit Rule Should be Granted." (Id., at p. 11)

From its Guidelines, NJSIAA provides that "waivers have been granted from the academic requirements because of language, handicaps or because a student is classified who could not carry a full academic load." (Id., quoting the Handbook at p. 64) However, the Guidelines do not provide waivers of the academic credit rule for students who choose to attend a foreign school, particularly where such students continue to compete in a sport for which they then seek eligibility, NJSIAA claims. In the instant matter, NJSIAA argues, B.P. attended a school in Finland, where he did not receive any grades or a transcript. It further notes that the courses were taught in Finnish, even though the student conceded that he only spoke a few words of Finnish before his departure in August 1988. Finally, NJSIAA submits that Millburn chose not to grant any credit for B.P.'s experience, thus, neither NJSIAA nor the Commissioner should. It adds in footnote that even if B.P. went to Finland through an approved foreign exchange program, he would still not be entitled to a fifth year of competition, and cites the Handbook at pages 62 and 63 in this regard.

Accordingly, NJSIAA urges that the Commissioner not substitute his judgment for that of NJSIAA, and submits that the EAC decision denying a waiver of the eight semester and academic credit rules should be affirmed.

Upon his careful review of the record, including the transcript of the hearing before the EAC, the Commissioner adopts as

his own the findings and conclusions reached by NJSIAA for the reasons expressed by its Executive Director, Robert F. Kanaby, in his letter dated December 14, 1989 to the Principal of Millburn High School, Dr. Keith Neigel, and in the Brief submitted by the NJSIAA.

The Commissioner would first note his accord with both parties that no impediment stands in the way of B.P.'s playing ice hockey during the second semester of this, his junior year at Millburn High School now, so long as he has met the requirements of the academic credit rule, Article V, Section 4E of the NJSIAA Bylaws. In so concluding, the Commissioner is also aware that by the passage of time, any emergent aspect to this matter has been rendered moot in that this year's hockey season at Millburn High School ended February 6, 1990. (See Tr. 207.) Moreover, having gained no academic credits during his year in Finland, the Commissioner determines B.P. has failed to meet the plainfaced requirements of Article V, Section 47 of the NJSIAA Bylaws and, thus, was ineligible for participation in ice hockey during the first semester of his junior year at Millburn. Having failed to advance the sort of exceptional circumstance as suggested in Smith, supra, for not having acquired the necessary credits, the Commissioner can find no basis for overturning the EAC's denial of B.P.'s request for waiver of this rule.

There remains, however, disposition of the question of B.P.'s participation in next season's hockey program at Millburn High School. Of his own admission, B.P.'s father states he was aware, before B.P.'s decision to spend a year in Finland, that the eight semester rule existed and might prevent his son's participation in sports upon return from Finland. See Tr. 215 wherein B.P.'s father stated:

> We took into consideration that academically he would be picking up eleventh grade when he came back to Millburn. We also were aware through people in the community, aware of this eight semester rule, that he probably would be losing his senior year for eligibility, but really had no idea of the twenty-three credit rule, this particular rule.

Hence, in electing to spend a year in Finland, B.P. accepted voluntarily the application of the eight semester rule as barring his playing hockey at Millburn High School during his senior year. Notwithstanding his commendable initiative in attending a Finnish School for a year independent of an approved student exchange program, it cannot be denied that petitioners acted at their own peril, and not without awareness of what consequences might result in so pursuing the course of B.P.'s year in Finland. Moreover, B.P. did enjoy a year's participation in ice hockey while in Finland, at what is purported to be a highly competitive hockey club. See Tr. 209 wherein the following information was solicited from B.P.:

DR. MARTIN: [B.], could you describe the club program? Was it equal to Millburn's program or better than?

[B.P.]: Better than.

DR. MARTIN: Much better, right?

[B.P.]: Yes.

DR. MARTIN: Were you playing regularly with the team four, five times a week?

[B.P.]: Right.

DR. MARTIN: So in reality you haven't been denied your junior year of playing ice hockey. In fact, you probably have played a higher brand of ice hockey by your own testimony.

Accordingly, the Commissioner finds no basis for determining that the decision of NJSIAA denying either waiver of its rules was in any way arbitrary, capricious or unreasonable. As noted by the NJSIAA, it is not the Commissioner's role in reviewing the matter brought to him pursuant to N.J.S.A. 18A:11-3 et seq. to substitute his judgment for the NJSIAA unless compelling reasons are provided in the record for him to do so. See R.S.R. v. NJSIAA et al., decided by the Commissioner November 13, 1986. See also Pascack Valley Regional High School District, supra. In the instant matter the record reveals no such compelling reasons to reject the EAC's determination. Therefore, the Commissioner concludes that petitioners have failed to sustain their burden of demonstrating arbitrary, capricious and unreasonable action on NJSIAA's part.

Consequently, the Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 0813-89
AGENCY DKT. NO. 12-1/89

JOHN A. GRINGERI,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF,
Respondent.

Paul J. Kraivanger, Esq. for petitioner
(Karl Z. Sosland, attorney)

Mark G. Sullivan, Esq. for respondent
(Sullivan & Sullivan, attorney)

Record Closed: November 21, 1989 Decided: January 5, 1990

BEFORE **KEN R. SPRINGER**, ALJ

Statement of the Case

This is an appeal from the refusal of a local board of education to certify tenure charges against two top school administrators. Basically, the issue is whether the board of education abused its discretion in deciding not to bring tenure charges against its own employees. Under *N.J.S.A.* 18A:6-11, the board must make two preliminary determinations before tenure charges may be certified to the Commissioner of Education ("Commissioner") for hearing on the merits. First,

whether there is probable cause to credit the evidence in support of the charge. Second, whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary. Petitioner's cause of action fails on both grounds.

Procedural History

On January 23, 1989, petitioner John A. Gringeri ("Gringeri") filed a verified petition with the Commissioner seeking an order directing respondent Wyckoff Board of Education ("Board") to file tenure charges against its superintendent of schools and its business administrator-board secretary. Respondent Board filed its answer opposing the requested relief on January 27, 1989.

Subsequently, on February 2, 1989, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case. The OAL held a hearing on November 21, 1989. At the conclusion of petitioner's proofs, the OAL granted respondent's motion to dismiss the petition without need for the Board to present any further evidence on its own behalf.

Findings of Fact

For purposes of involuntary dismissal at the close of petitioner's case, the facts and any inferences to be drawn therefrom must be viewed in a light most favorable to petitioner. All of the operative facts necessary for a full and fair disposition of this controversy are either stipulated by the parties or may be accepted from the testimony of petitioner's own witnesses. **I FIND:**

John A. Gringeri is a citizen of the Township of Wyckoff and the parent of two students attending high school in the Wyckoff school district. On November 14, 1988, Gringeri submitted a notarized letter to the Board charging that school superintendent Roger Clarke and business administrator-board secretary Richard Davis "deliberately" violated Board policy on student transportation "by authorizing students ineligible for bus transportation to be bussed from Eisenhower School, Wyckoff New Jersey to Temple Beth Rishon, Wyckoff, New Jersey for an after school activity." He demanded that the Board certify a tenure charge of "misconduct" against both of these individuals.

The Board freely admits that on two isolated instances on September 14 and 19, 1988 eleven students were delivered by bus from the high school to the Temple for religious instruction. However, the Board maintains that the action was taken primarily for health and safety considerations, was nondiscriminatory, and, in any event, was fully consistent with the Board's own instructions to its administrative staff. It should be added that the practice was almost immediately discontinued and that the Board has no intention of reinstituting it in the foreseeable future.

In order to appreciate the surrounding circumstances, it is necessary to understand the physical condition of the high school building at the relevant time period. Prior to the opening of classes in September 1988, the roof of the high school building was in need of substantial repair and the Board had engaged a contractor to apply asphalt and hot tar at scalding temperatures of not less than 350 degrees Fahrenheit. Despite reasonable efforts by the Board to have the roofing job completed over the summer, the work was not done on time. Consequently, the work had to be continued after the school session had already begun.

To minimize the risk of injury to the children, the Board modified the normal school day so that the the work could be performed in the morning before the children arrived. Part of this modification required students to remain much longer in the afternoon. Instead of the regular closing time of 2:20 p.m., the school day was temporarily extended to about 5:00 p.m. District administrators consulted the Bergen County Superintendent of Schools, and he approved this temporary schedule "for a maximum of eight weeks." As it ultimately developed, the emergency lasted only three weeks and the district resumed regular school hours on September 28, 1988. Gringeri had objected to any change in the regular school hours, and at the administrative hearing expressed his personal view that students could have safely occupied the building while the hot tar was being applied to the roof. As a responsible public body, however, the Board made a reasonable judgment that protection of the children's safety should be of paramount concern.

It was in this context that the Board endeavored to assist those children and parents most likely to be inconvenienced by the shift in school hours. At an open meeting on September 1, 1988 the Board listened to public comments about transportation problems caused by the emergency. Since it was impractical to bus all

210 children who were not entitled to transportation by state law, the Board concluded that the next best solution was to encourage parents to set up temporary car pools. In addition, the Board offered the help of district staff for those parents unable to make their own arrangements for transportation. Joseph Desiderio, principal of the high school, personally coordinated the activity of matching children with available ride pools. One of petitioner's witnesses, Mrs. Eleanor Menasian, corroborated that Mr. Desiderio prepared a list of all children in her neighborhood who couldn't find rides.

Written job responsibilities of the Wykoff superintendent of schools include a delegation of power to act on his own discretion "if action is necessary on any matter not covered by Board policy." Here, however, the Board was kept fully informed of the situation and had authorized its superintendent to do whatever was reasonably necessary to deal with the crisis and to lessen its impact on the community. Sensitive to the nonacademic needs of his students, Dr. Clarke contacted various members of the clergy to inquire if the extended school schedule would interfere with plans for after-school religious instruction. His approach was totally nondenominational. He got in touch with Reverend Ducan, chairperson of the Wyckoff Clergy Association, and Sister Maureen, principal of St. Elizabeth's School, as well as with Rabbi Belzar of Temple Beth Rishon. Only one of the local churches or synagogues had a potential conflict. No evidence was introduced that anyone was discriminated against or denied equal treatment on the basis of religion.

Religious instruction at the Temple was scheduled to begin at 5:00 p.m., just as school would be letting out under the new hours. Arrangements were made to transport eleven students from the high school to the Temple on the two dates previously indicated. Of the eleven students, five ordinarily rode the school bus anyway and were simply dropped off at a different location. An existing bus route already went right by the Temple and empty seats happened to be available on that bus. Hence, the stopgap measure did not require any extra public funding for a bus or a driver.

Superintendent Clarke's role in making these arrangements is clearly established. As the record reflects, he acted in the spirit of cooperation with the community and to limit public inconvenience due to extraordinary circumstances. Business administrator-board secretary Davis's involvement, if any, is far less readily apparent. Aside from the fact that his formal job duties include "operation and maintenance of district-owned buses," there is nothing on the record to indicate

that he had anything directly to do with arrangements to bus children for religious instruction.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Board's action was reasonably within its statutory discretion and that Gringeri has failed to make out a *prima facie* case for relief.

Local boards of education are vested with broad discretion to decide in the first instance whether or not to certify tenure charges against an employee accused of wrongdoing. *N.J.S.A.* 18A:6A-11 provides, in part:

> Any charge made against any employee of a board of education under tenure during good behavior and efficiency shall be filed with the secretary of the board in writing, and a written statement of evidence under oath to support such charge shall be presented to the board. The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary.

The limited function of the local board has been likened to that of a Grand Jury in a criminal proceeding, namely to make findings of whether sufficient probable cause exists to subject the accused to a full evidentiary hearing. *In re Cowan*, 224 *N.J. Super.* 737, 746 (App. Div. 1988). See also, *In re Fulcomer*, 93 *N.J. Super.* 404 (App. Div. 1967). Once probable cause has been found, the Commissioner of Education or his designee has exclusive jurisdiction to hear the evidence, ascertain the truth of the charges, and impose any disciplinary sanctions. *Fulcomer*, at 412.

At the outset, the Board sought to dismiss the petition for lack of a properly sworn statement of evidence required by *N.J.S.A.* 18A:6-11 and the implementing regulation, *N.J.A.C.* 6:24-5.1(b). It is tempting to resolve this matter on procedural grounds. While the original document which Gringeri submitted to the Board may be technically defective, justice will be better served by a careful consideration of the substance of Gringeri's complaint, especially in light of the fact that Gringeri was

unrepresented by legal counsel when the charges were initially referred to the Board's attention.

The first of the two questions expressly projected by *N.J.S.A.* 18A:6-11 is: Does probable cause exist to credit the evidence in support of the charges? *Manalapan-Englishtown Ed. Ass'n v. Manalapan-Englishtown Reg. Sch. Dist. Bd. of Ed.*, 187 *N.J. Super.* 426, 429 (App. Div. 1981). Gringeri had charged the two administrators with having "deliberately violated" Board policy and with conduct which was "blatantly discriminatory" and "demonstrated their bias and prejudice against other students." After thorough discussion of the evidence in support of the allegations, the Board voted unanimously to reject the charges because both administrators "had acted with the full authority and direction of the Board." Instead, the Board found that the school administration had merely followed the Board's specific direction to assist the public in avoiding any unnecessary inconvenience caused by the delay in the roof project. Evidence adduced at the hearing fully supports the reasonableness of the Board's determination that the two administrators did not exceed their legitimate authority and that probable cause is lacking.

Next, the Board must consider the second question of whether the charges, if credited, are sufficient to warrant dismissal or reduction in salary. A school board's determination that dismissal or reduction in salary is unwarranted will be upheld if it is "not arbitrary or capricious and if it is based on a correct understanding of existing law." *Ridgefield Park Ed. Ass'n v. Ridgefield Park Bd. of Ed.*, 1984 *S.L.D.* ____ (St. Bd. Feb. 8, 1985), aff'd Dkt. No. A-2859-84T7 (N.J. App. Div., Dec. 24, 1985). Although the Board found lack of probable cause to credit the charges, it also did not regard the charges, even if true, as serious enough to justify a dismissal or reduction in salary. Board counsel argued at the hearing that the charges do not rise to the level of a tenure proceeding. Use of district-owned school buses to transport children to religious instruction was an isolated event in response to an extraordinary situation. Even if such practice were against Board policy or otherwise improper, it was done with the best of intentions and for praiseworthy purposes. Moreover, the practice was soon discontinued and is unlikely to be repeated. Given the trifling nature of the offense and the extenuating circumstances, the Board may reasonably have reached the result that it did. *De minimus non curat lex.*

Order

It is **ORDERED** that the petition is hereby dismissed.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

Jan. 5, 1990
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged: Fax transmittal

Jan. 8, 1990
Date

Elizabeth Lazzari (OAL)
for DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN
Date

Jaynee LaVecchia/KS
OFFICE OF ADMINISTRATIVE LAW

al

JOHN A. GRINGERI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF WYCKOFF, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's replies thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

In his exceptions, petitioner argues that involuntary dismissal of this matter was inappropriate, as he did in fact present a prima facie case; that there was no showing in the record that the disputed busing ameliorated student health and safety, and that even if it had, it was still a violation of law; that there is no basis in the record for finding that public monies were not spent by the Board in connection with the disputed busing; and that the disputed busing was provided for religious purposes, a violation of law that extenuating circumstances and good intentions cannot be permitted to justify. In support and amplification of these exceptions, petitioner also submits a brief wherein he argues that the disputed busing violated the "establishment" clause of the First Amendment to the U.S. Constitution, State statutes governing provision of transportation to and from school, and the Board's own transportation policy; and that the district's actions discriminated against some pupils by treating others similarly situated in a preferential manner.

In reply, the Board asserts that petitioner's exceptions essentially address irrelevant matters, since the controlling issue in this case is whether or not the Board abused its discretion in refusing to certify tenure charges against the two administrators singled out by petitioner. The Board also notes that procedural deficiencies identified early in the hearing (Initial Decision, ante) should have been included by the ALJ as a further reason for dismissing petitioner's complaint, and that the brief appended to petitioner's exceptions should not be considered by the Commissioner because it was never submitted to the ALJ.

Upon careful review of this matter, the Commissioner concurs with the ALJ's dismissal of petitioner's claim. As both the ALJ and the Board recognize, and as petitioner apparently agreed during the prehearing conference (Prehearing Order, at pp. 1-2), the issues in this case revolve around the Board's refusal to certify tenure charges, not the abstract legality or propriety of the bus usage underlying petitioner's charges. It might well be argued that the administrators in question should have recognized the

implications of using public school buses to transport students to religious instruction--even if only on two occasions, at no additional cost, and in response to extraordinary circumstances--and found some other way to accommodate the needs of the affected students. It might also be noted that, even though the disputed transportation was clearly the result of district outreach to community organizations likely to be affected by the school scheduling change, rather than parent, student or clergy requests that were treated differently from other similar requests; and of need meeting opportunity, since empty seats happened to be available on a bus that passed the temple on its regular route; the administration should have recognized the potential for creating the appearance of discrimination, particularly in view of the sensitivity of the situation and the many requests the district was unable to accommodate through use of school buses. However, the Commissioner concurs with the Board and the ALJ that, under the circumstances, any possible violation on the part of administrators was unintentional, trifling, isolated and committed only by way of a systematic attempt to canvass the community in a Board-directed effort to minimize disruption of normal organized activities. Consequently, the Board cannot be faulted for declining to bring, on this basis alone, tenure charges against employees who may have committed a de minimis infraction while acting in good faith and in accordance with the Board's directives. Certainly, charges founded on this infraction alone would not have been sufficiently flagrant to meet the "single incident" standard established in In Re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967), at 421-422, and its progeny.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons well stated therein, and the instant Petition of Appeal dismissed with prejudice.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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* With respect to the Board's arguments in reply to petitioner's exceptions, the Commissioner notes that it was not necessary for the ALJ to reach to procedural deficiencies in petitioner's filing with the Board, given his findings on the substantive issues underlying it. The Commissioner also rejects the notion that he should not have entertained petitioner's brief, in that, regardless of whether or not such brief was submitted to the ALJ, it was duly incorporated into petitioner's exceptions and therefore entitled to consideration.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6957-88
AGENCY DKT. NO. 216-7/88

JOSEPH L. PICOGNA,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,
Respondent.

Paul E. Griggs, Esq., for petitioner

Robert M. Tosti, Esq., for respondent (Rand, Algeier, Tosti, attorneys)

Record Closed: June 26, 1989 Decided: January 12, 1990

BEFORE **RICHARD J. MURPHY, ALJ:**

Statement of Case

This case raises a question of jurisdiction involving the Commissioner of Education's authority against the power of the Superior Court to decide claims of retaliatory dismissal of untenured, non-teaching employees of Boards of Education, under New Jersey's Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 *et seq.* Petitioner Joseph L. Picogna was terminated from his position as Assistant Superintendent and Business Board Secretary in May of 1988 by the respondent Board of Education of Cherry Hill (Board) and he has petitioned the Commissioner of Education (Commissioner) to challenge that termination on five grounds, including a claim of unlawful retaliation.

Petitioner Picogna has also filed a five count complaint against the Board challenging his termination in the Superior Court of New Jersey, Chancery Division, seeking damages and reinstatement. In the Superior Court complaint, filed shortly after the Administrative petition, he alleges, among other things, violation of *N.J.S.A.* 34:19-1 *et seq.*, as to unlawful termination based on retaliation for "whistleblowing" activities. The Fifth Count of the administrative petition and of the Fourth Count Superior Court complaint are based on the same acts of allegedly retaliatory dismissal

For the reasons set forth below petitioner's motion to dismiss on jurisdictional grounds is denied as to Counts I through IV of his petition and granted as to Count V, pertaining to retaliation. Respondent's cross motion is also granted as to the Count V for dismissal of the retaliatory aspect and denied as to the first four counts. Petitioner's motion to dismiss is construed as a withdrawal of his petition, without prejudice, as to Counts I through IV.

Procedural History

Joseph Picogna filed a petition with the Commissioner on June 27, 1988 seeking to overturn his termination effective May 24, 1988. The case was transmitted to the Office of Administrative Law (OAL) on September 22, 1988 pursuant to *N.J.S.A.* 52:14F-1 *et seq*., and the transmittal sheet (attached) stated that the:

(1) [s]ole issue to be dealt with is allegation of wrongful dismissal because petitioner challenged vouchers submitted by Supt. - Count 5 of petition;

(2) Allegation or duplicate filing in Superior Court is to be argued.

A prehearing was held on November 10, 1988 to settle the issues and procedure. The case was scheduled for hearing during the week of June 26, 1989, but these dates were adjourned pending resolution of petitioner's motion for summary decision and the respondent Board's cross-motion to dismiss on jurisdictional grounds. The due date for submission of this decision was extended from August 10, 1989 until January 12, 1990 due to the need for further consideration of the somewhat novel issue raised and also because of a substantial

backlog of opinions resulting from an extensive pending public utility case. I regret any inconvenience caused by this extended but unavoidable delay.

Findings of Fact

The material facts needed to decide these motions are undisputed.

Joseph L. Picogna (petitioner), was employed by the Township of Cherry Hill Board of Education (respondent), as Assistant Superintendent for Business/Board Secretary by an employment contract dated April 30, 1985, which covered the three-year period July 1, 1985 through June 30, 1988. This contract was terminated effective April 29, 1988 by the Board of Education on recommendation of the Superintendent of Schools, Philip Esbrandt. Respondent contends the contract was terminated properly for cause. Petitioner claims that the contract was wrongfully terminated in retaliation of his having reported alleged improprieties by superintendent Esbrandt, as to certain invoices charged to the Township.

As stated, on June 27, 1988, petitioner filed a Petition with the Commissioner of Education, under *N.J.S.A.* 18A:6-9, seeking reinstatement, backpay and other relief. That complaint sets forth, in five counts, the following violations:

(1) Failure to state a reason under his contract;
(2) Inadequate notice under the contract;
(3) Violation of Constitutional Rights of Due Process and Equal Protection;
(4) Subversion of tenure rights; and
(5) Arbitrary, capricious and unreasonable action of the Board in relying on a Superintendents recommendation made in retaliation for petitioners questioning of invoices.

Shortly after filing the Petition with the Commissioner of Education, petitioner filed a complaint in the Chancery Division, Camden County Superior Court (July 5, 1988) based on the same conduct as that complained of in the Petition. The Civil Complaint alleged that petitioner's termination was in violation of the Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 et seq. , among other violations:

(1) Damage to reputation;
(2) That he was prevented from obtaining tenure or suitable employment;

(3) That his rights to due process was violated by the Board's procedure;
(4) That he has a cause of action for retaliatory termination under the Conscientious Employee Protection Act, *N.J.S.A.* 34:19-1 *et seq.*; and
(5) That the Board has further damaged his reputation so as to prevent him from obtaining employment in the field of education.

The Superior Court action has been stayed pending the outcome in this proceeding, which turns on petitioner's pending motion to dismiss for lack of jurisdiction and respondent Board's cross-motion to dismiss because of the filing of an action under *N.J.S.A.* 34:19-1 *et seq.* Respondent moved to have the Chancery Court matter dismissed for failure to exhaust administrative remedies, or in the alternative to have it transferred to the Law Division. The Hon. Paul A. Lowengrub, JSC stayed the Chancery Court action until petitioner had exhausted his administrative remedies before the Commission. On July 1, 1989, petitioner filed a motion to dismiss the administrative Petition on the grounds that the dispute is purely contractual in nature, and thus the Commissioner of Education lacked jurisdiction to hear the matter. On June 6, 1989 respondent filed a cross-motion to dismiss based on petitioner's Chancery Division action. Respondent argues that by filing of the Chancery Court action, raising a claim under the Conscientious Employee Protection Act, petitioner waived all rights and remedies under any other contract, collective bargaining agreement, state law, rule or regulation or under the common law, and that this action must be dismissed.

Respondent further requests a determination that petitioner has failed to set forth a cause of action by which he was entitled to tenure, and that he has received sufficient due process under the State and U.S. Constitution.

Issue

(1) Whether petitioner's motion to dismiss for lack of general jurisdiction and respondent's cross-motion to dismiss based on the filing of an action under *N.J.S.A.* 34:19-1 *et seq.*, should be granted as to all Counts of his petition and as to Count V, in particular.

Discussion and Conclusions of Law

Counts I through IV of the administrative petition, are founded on claimed contractual, tenure, and constitutional rights and alleged violations and not on the

purportedly retaliatory recommendation of the Superintendent and the Board's wrongful reliance upon it, which is addressed directly in Count Five. Petitioner Picogna, who initially invoked the Commissioner of Education's (Commissioner) jurisdiction to decide all five counts, now objects to that jurisdiction and seeks dismissal in order that he may pursue his Superior Court complaint, which may, under *N.J.S.A.* 34:19-5, result in punitive damages, and a fine, both of which are beyond the power of the Commissioner to impose.

As to the retaliatory allegations of Count V of the administrative complaint, I **CONCLUDE**, as respondent argues, that the petitioner waived his right to the Commissioner's review by filing a complaint in Superior Court under the Conscientious Employee Protection Act (Act), which provides, in part:

> Nothing in this Act shall be deemed to diminish the rights, privileges, or remedies of any employee under any other Federal or State Law or regulation or any Collective Bargaining Agreement or Employment Contract; Except that the institution of an action in accordance with this act shall be deemed of waiver of the rights and remedies available under any other contract, Collective Bargaining Agreement, State Law, Rule or Regulation or under the Common Law. [*N.J.S.A.* 34:19-8; emphasis added]

The Act also defines "employer," to include ". . . all branches of state government, or the several counties and municipalities thereof, or any political subdivision of the State, or a school district, or any special district, or any authority, commission or board of any other agency or instrumentality thereof." [*N.J.S.A.* 34:19-2(a)]. The respondent Board in this case would fall within the definition of "employer" in the Act, and the petitioner is (or was) an "employee" within the statute because he was one who performed services for and under the control and direction of employer for wages or other remuneration. [*N.J.S.A.* 34:19-2(b)]. The conduct complained of by the petitioner in Count V of the administrative complaint falls within the definition of "retaliatory action" as set forth in the act, which means:

> [t]he discharge, suspension or demotion of employee or other adverse employment action taken against an employee in the terms and conditions of employment. [*N.J.S.A.* 34:19-2(e)]

> An employer shall not take any retaliatory action against an employee because the employee does any of the following:
>
> a. Discloses, or threatens to disclose to a supervisor or to a public body an activity, policy or practice of the employer

that the employee reasonably believes is in violation of a law, or rule or regulation promulgated pursuant to law;

b. Provides information to, or testifies before, any public body conducting the investigation, hearing or inquiry into any violation of law or rule or regulation promulgated pursuant to law by the employer . . . . [*N.J.S.A.* 34:19-3]

Petitioner's claim in Count V that Superintendent Esbrandt recommended the termination of his contract only after petitioner requested that the Board investigate specific invoices submitted by the Superintendent falls within the definition of retaliatory action, as well as that of protected employee actions under *N.J.S.A.* 34:19-3, and I so **CONCLUDE**. As to whether petitioner provided sufficient notice and opportunity to the Superintendent to correct his activity as to the invoices before any disclosure was made to the Board, petitioner is left to the discretion of the Superior Court, which has jurisdiction. See, *N.J.S.A.* 39:19-4, 5. "An employee who claims that his protected actions have been the subject of an employer's retaliatory action has a choice of filing a "civil action" in a court of competent jurisdiction, within one year, for relief . . ." , or of pursuing other available rights and remedies under contract, bargaining agreement, state law, rule, or regulation or under the common law. [*N.J.S.A.* 34:19-5, 8]. The Act plainly states that the filing of a civil action in a court of competent jurisdiction effects a waiver of other rights and remedies, which, in this case, would include any claim under petitioner's contract and any right to review before the Commissioner by regulation as to the allegations of retaliatory reaction against protected actions. There is thus no need for an aggrieved employee to first exhaust administrative remedies before the Commissioner if the petitioner elects to proceed by way of a civil action in a court of competent jurisdiction within one year of the violation. The Act also provides for a number of remedies, including punitive damages and civil fines, which may only be imposed by the Superior Court; and are not available to the Commissioner of OAL:

Upon a violation of any of the provisions of this act, an aggrieved employee or former employee may institute a civil action in a court of competent jurisdiction, within one year, for relief which may include, and which the court may order, the following:

a. An injunction to restrain continued violation of this act;

b. The reinstatement of the employee to the same position held before the retaliatory action, or to an equivalent position;

c. The reinstatement of full fringe benefits and seniority rights;

d. The compensation for lost wages, benefits and other remuneration;

e. The payment by the employer of reasonable costs, and attorney's fees;

f. Punitive damages; or

g. An assessment of a civil fine of not more than $1,000.00 for the first violation of the act and not more than $5,000.00 for each subsequent violation, which shall be paid to the State treasurer for deposit in the General Fund.

[*N.J.S.A.* 34:19-5; emphasis added]

OAL is not a "court of competent jurisdiction" within the meaning of *N.J.S.A.* 34:19-5. The (OAL) was created to perform the same functions formerly performed by agency hearing officers. The OAL "judges" conduct hearings, make recommended findings of fact and recommended decisions to agency heads. In re Kallen, 92 N.J. 14, 22-23 (1983). See, *N.J.S.A.* 52:14B-10. It is a well established principle that administrative agencies are not judicial tribunals, (though they may take on many judicial trappings). In re Uniform Admin. Procedure Rules, 90 N.J. 85, 92 (1982); In re Kallen, 92 N.J. 14, 24 (1983); Matter of Tenure Hearing of Onorevale, 103 N.J. 548 (1986). Administrative law judges have no independent decisional authority. In re Kallen, 90 N.J. at 94. As a result, a complaint raising a claim under the Act cannot be heard in an administrative tribunal, such as OAL.

Given the plain direction of the Conscientious Employee Protection Act as to the affect of the filing of an action under it, I CONCLUDE that Count V of the administrative complaint should be dismissed pursuant to *N.J.S.A.* 34:19-1, 8.

Respondent Board also argues that the first four counts of the administrative petition should be dismissed under *N.J.S.A.* 34:19-8, given the fact that petitioner has chosen his remedy in Superior Court. Petitioner moves to dismiss Counts I through IV, but for the reason of a general lack of jurisdiction by the Commissioner not relating to the filing of his civil action under *N.J.S.A.* 34:19-1 *et seq.* I think that both respondent and petitioner are mistaken in their analysis as to Counts I through IV. The effect of filing of an action under the Conscientious Employee Protection Act is limited to those allegations which are based on impermissible retaliatory action against a Protected Employee Action, as set forth in Count V and does not pertain to other violations not based on retaliation as such, but founded on contractual rights

to notice or reasons for dismissal, constitutional rights or due process, or claimed tenure rights. The waiver of rights set forth in *N.J.S.A.* 34:19-8 applies only to those rights and remedies as to the retaliatory action, and not as to matters of contract, tenure, or constitutional right which are distinct and may be maintained even in the absence of a retaliatory dismissal. On that basis, I **CONCLUDE** that respondent's cross-motion for dismissal must be denied as to Counts I through IV. Petitioner's motion to dismiss the first four counts should also be denied for the reason that the Commissioner has jurisdiction over the matters set forth in those counts, as petitioner conceded when he initially filed his administrative petition. He now seeks to disavoln that petition and to proceed in Superior Court where the availabile penalties are more varied and severe.

Although I deny petitioner's motion to dismiss the four counts for lack of jurisdiction, as well as respondent's cross-motion, I **CONCLUDE** that petitioner's action in making this motion to dismiss constitutes a withdrawal of the petition as to Counts I through IV. I also note that this matter was transmitted to the Office of Administrative Law to deal with the sole issue of the wrongful dismissal because of petitioner's allegations against the Superintendent, as well as the claim that the duplicate filing in Superior Court removed jurisdiction from the Commissioner.

Order

On the basis of the above Findings of Fact and Conclusions of Law it is **ORDERED** that petitioner's motion and respondent's cross-motion to dismiss are **GRANTED** as to Count V of the administrative petition because of the filing of an action under *N.J.S.A.* 34:19-1 *et seq.* So **ORDERED;**

It is further **ORDERED** that petitioner's motion and respondent's cross-motion to dismiss are denied as to Counts I through IV for the reasons set forth above. It is further **ORDERED** that petitioner's motion to dismiss constitutes a withdrawal of his petition as to Counts I through IV which is **GRANTED.** So **ORDERED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby FILE this Initial Decision with **SAUL COOPERMAN** for consideration.

1.12.90
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

1/12/90
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 18
DATE

OFFICE OF ADMINISTRATIVE LAW

ct

JOSEPH L. PICOGNA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by respondent ("the Board"), and replies thereto by petitioner, pursuant to N.J.A.C. 1:1-18.4.

Despite the position taken in its prior motion, in its exceptions the Board argues that, in view of the Superior Court Order staying action in that forum until petitioner had exhausted his administrative remedies, the ALJ should not have permitted petitioner to withdraw his complaint before the Commissioner. The Board explains:

> Dr. Picogna commenced two proceedings complaining of the same transactions and occurrences; he filed the within Petition on June 26, 1988 and his Superior Court Complaint only ten days later on July 6, 1988. Thus, the Board was compelled to seek an Order in the Superior Court Action seeking to dismiss that Action, or in the alternative, to transfer that Action to the OAL and stay all further proceedings therein until Dr. Picogna exhausted his administrative remedies. Essentially, the bases for the Board's Motion were that the two proceedings were duplicative and that resolution of the threshold legal and factual issues concerning the termination of Dr. Picogna's employment was best suited for this administrative proceedings.*** By construing Dr. Picogna's Motion to Dismiss for Lack of Subject Matter Jurisdiction as an application to withdraw his Petition, A.L.J. Murphy assumed that Dr. Picogna had the right to withdraw this Petition. However, Dr. Picogna could not voluntarily withdraw his Petition in the face of the Superior Court stay. Judge Lowengrub ordered Dr. Picogna to exhaust his administrative remedies before seeking further relief from the Superior Court.***
>
> (Board's Exceptions, at pp. 2-3)

The Board further argues that the jurisdiction of the Office of Administrative Law (OAL) to hear all of the questions of law and fact arising in this case has already been established, since the Superior Court issued its Order of Stay after hearing both petitioner's argument that OAL lacked jurisdiction to hear his complaint and the Board's argument that OAL was the more appropriate forum in which to proceed. Also noted is an unopposed OAL Pretrial Order stating that "this matter will proceed regardless of the outcome in Superior Court, as the Commissioner of Education would appear to have primary jurisdiction." The Board avers:

> ***The doctrine of "law of the case" stands for the principle that "where there is an unreversed decision of a question of law or fact made during the course of litigation, such decision settles that question for all subsequent stages of that suit." *** "[T]his rule is based upon the sound policy that when an issue is once litigated and decided during the course of a particular case, that decision should put an end to the matter."
>
> Judge Murphy erred in considering the issue of subject matter jurisdiction because this issue had been raised and resolved in both the Superior Court and administrative proceedings. Dr. Picogna has already established a propensity for duplicative litigation. By permitting him to re-litigate "resolved" issues without end, the Court will contravene public policy in favor of settling controversies and disputes.*** (citations omitted)
>
> (Board's Exceptions, at pp. 4-5)

Without waiving its objection to the ALJ's having considered the already settled question of jurisdiction, the Board reiterates its argument in support of the Commissioner's competence to hear this matter and, further, observes that:

> Judge Murphy implicitly acknowledges that the Commissioner has jurisdiction to make findings of fact necessary for determinations under The Conscientious Employees Protection Act. On Page 5 of his Decision, Judge Murphy has determined that the Board falls within the definition of "Employer" under the Act, that Dr. Picogna is (or was) an "Employee" within the Act, and that the conduct complained of by Dr. Picogna in Count V alleges "Retaliatory Action" as set forth in the Act. Certainly if Judge Murphy could decide these questions of law and fact, the inquiry should not end there. For this reason, the Board asserts that the dismissal of Count V was at the very least premature. It

> should be considered on its merits by the Commissioner. Even if the Commissioner ultimately finds that jurisdiction is lacking, such a determination should only be made upon review of the case as a whole.***(Id., at pp. 7-8)

Finally, the Board excepts to the ALJ's failure to address the substantive issues of its previous filings. It claims:

> By permitting withdrawal of the instant Petition, Judge Murphy has granted relief which is particularly inequitable to the Board. By making its Motion for Summary Disposition, the Board sought a finding of fact and law that Petitioner's claims are without merit, and should be dismissed with prejudice. In support of its motion the Board provided Judge Murphy with numerous submissions. Even though the Board's application received no opposition, virtually all of the substantive issues raised by the Board were not mentioned by Judge Murphy. Accordingly, the Board now seeks a determination that Petitioner's pursuing a claim under the Conscientious Employee's Protection Act has constituted a waiver of all rights and remedies available under his employment contract, state law or rule, or under common law. Further regardless of the finding in the prior issue, the Board seeks a determination as to whether Petitioner has alleged a prima facie case whereby he could be entitled to tenure (or damages for denial of tenure) as a matter of Education Law; and, whether the notice and hearing provided to Petitioner satisfies the Board's due process obligation under New Jersey Law and the United States Constitution.***

In reply, petitioner argues that "exhaustion of administrative remedies" within the meaning of the Superior Court Order did not imply that the Commissioner must hear the case on its merits; rather, it required the Commissioner simply to make some sort of determination regarding the case. In this context, petitioner argues, the Commissioner was recognized as the one who, using his expertise in education, could best decide the most appropriate forum for reviewing petitioner's claims. Accordingly, a determination by the Commissioner that this matter should be returned to Superior Court would fully satisfy the court's directive. In support of such a determination, petitioner reiterates his previous argument that the instant matter hinges on contractual and other non-educational issues rather than on questions of school law. After contending thus, petitioner

concludes by urging affirmance of the initial decision of the ALJ dismissing Count V and construing petitioner's Motion to Dismiss Counts I through IV as a request for withdrawal without prejudice.

Upon review of this matter, the Commissioner concurs with petitioner that the Order of the Superior Court was neither a directive to hear the matter on its merits, nor a determination that jurisdiction necessarily lay with the Commissioner but, rather, a requirement that administrative proceedings be brought to closure prior to further court action. With this end in mind, the Commissioner determines that Counts I, II and IV of the instant petition clearly arise from a contractual dispute not arising under the school laws and hence more properly justiciable before the Superior Court (Salley v. Bd. of Ed. of City of Newark et al., Essex County, decided by the Commissioner November 8, 1984) that Count III involves no special educational issue such that the Commissioner's expertise would be necessary either to decide the matter on its merits or to establish a record for further proceedings (in contrast to Abbott v. Burke, 100 N.J. 269 (1985), cited by the Board at Exceptions, at p. 6); and that Count V has been waived by petitioner by virtue of his filing of a court action pursuant to N.J.S.A. 34:19-1 et seq. at set forth at pages 5-7 of the initial decision. With respect to Count IV, the Commissioner acknowledges his jurisdiction over the question of petitioner's tenure status should he prevail in his contractual complaint and obtain reinstatement to his former position; however, this would be a matter for subsequent inquiry and need not be determined here.

The Commissioner therefore affirms the initial decision of the Office of Administrative Law with respect to Count V for the reasons stated therein. However, with respect to Counts I through IV, he modifies the ALJ's determination so that these counts are dismissed for lack of jurisdiction rather than deemed to have been withdrawn without prejudice by petitioner. Accordingly, the instant Petition of Appeal is, in its entirety, dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JOSEPH L. PICOGNA,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF CHERRY HILL, CAMDEN COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, February 23, 1990

For the Petitioner-Respondent, Paul E. Griggs, Esq.

For the Respondent-Appellant, Rand, Algeier, Tosti & Woodruff (Robert M. Tosti, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

July 5, 1990

Pending N.J. Superior Court

IN THE MATTER OF THE TENURE	:	
HEARING OF DAVID BORRELLI, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	ORDER
WATERFORD, CAMDEN COUNTY.	:	
	:	

For the Petitioning Board, Maressa, Goldstein, Birsner, Patterson, Drinkwater & Oddo (Robert E. Birsner, Esq., of Counsel)

For the Respondent, Steinberg and Ginsberg, (Saul J. Steinberg, Esq., of Counsel)

This matter was opened before the Commissioner by way of the certification of tenure charges against respondent for conduct unbecoming a teacher. Respondent, by way of his answer, raises several affirmative defenses which aver that the Board failed to comply with the Open Public Meetings Act (OPMA), N.J.S.A. 10:4-6 et seq. and various procedural requirements of N.J.S.A. 18A:6-10 et seq. and N.J.A.C. 6:24-1 et seq.

More specifically, respondent avers that the manner in which the Board undertook to certify tenure charges against him was procedurally deficient under the OPMA because the Board failed to provide adequate notice of the November 15, 1989 meeting at which the action was taken. Among other things, he points to N.J.S.A. 10:4-8d which defines adequate notice as written advance notice of

at least 48 hours and, to the extent known, the agenda of any regular, special or rescheduled meeting.

As to this, respondent maintains that the charges were transmitted to him on October 30, 1989 indicating that the matter would be considered at the Board meeting of November 15, 1989, thus, under N.J.S.A. 10:4-8d, there was sufficient time for the Board to give 48 hours public notice of that portion of the agenda. In support of this, respondent relies on In the Matter of the Tenure Hearing of Dolores Gandia, School District of Atlantic City, Atlantic County, decided by the Commissioner on October 1, 1982 wherein the respondent was given actual personal notice of the date the Board was to consider tenure charges, but the Board action to certify said charges was voided because the Board had failed to comply with N.J.S.A. 10:4-18, the annual notice provisions, and N.J.S.A. 10:4-8, the adequate notice provisions.

On the basis of In re Gandia, supra, respondent argues that whether or not he received actual notice of the meeting at which the charges against him would be discussed is of no moment. Rather, he avers that the tenure charges against him should be dismissed because there is no evidence he has been able to discover that there was any notice published of the private session at which the charges against him were discussed. He cites in support of this Pollilo v. Diane, 74 N.J. 562 (1977) which ruled that substantial compliance with the OPMA is not enough; N.J.S.A. 10:4-8d spells out in detail what must be done in order to provide the public adequate notice, and strict adherence to the letter of the law is required in

considering whether a violation of the act has occurred (at 577).

Respondent also alleges that contrary to the provisions of N.J.S.A. 18A:6-11 which requires that charges brought against tenured employees be in the form of a written statement under oath to support such charge, the October 30, 1989 letter from Superintendent Richard Salimena, although sworn, is not a statement of evidence. Rather, the superintendent merely attached copies of statements made by students/parents which had been given to the Office of the Camden County Prosecutor.

In support of his position on this issue, respondent cites In the Matter of the Tenure Hearing of Cowan, Bernardsville Board of Education, 224 N.J. Super. 737 (App. Div. 1988), a matter wherein the Court rejected the appellant's argument that the sworn statement of evidence must be made by an individual(s) having personal knowledge of the facts recited in the statement and noted that, as in grand jury proceedings, the tenure charges could be sustained based upon hearsay statements recounted or presented by a witness under oath. More specifically, the Court ruled that sworn statements of the principal and vice-principal, which recounted the facts that named people with personal knowledge of the matter had reported to them, met the requirements of a statement of evidence under oath contained in N.J.S.A. 18A:6-11.

As to this, respondent avers that there is a critical difference between the sworn statement of evidence in In re Cowan, supra, and the instant matter in that the superintendent's October 30, 1989 letter does not indicate that the individuals whose statements were transmitted to the prosecutor's office, in fact,

spoke to the superintendent. Thus, respondent avers that the superintendent could not be in the same position as the principal and vice-principal in Cowan in that individuals with personal knowledge of the allegations did not convey those facts to the superintendent.

Respondent argues further that (1) the charges set forth by the superintendent's letter of October 30, 1989 are more closely akin to those in In the Matter of Tenure Hearing of Kathleen Kunz, School District of Willingboro, Burlington County, decided by the Commissioner December 16, 1985 [1985 S.L.D. 1770] wherein it was determined that the superintendent's sworn statement did not meet the requirements of N.J.S.A. 18A:6-11 and (2) the manner in which the tenure charges were filed herein leaves respondent with great difficulty in ascertaining exactly what it is the Board complains of. As such, he avers he is left to ferret through pages of statements to the prosecutor's office without any indication from the Board as to what portions of the statements it relies upon and what specifically it complains of.

The Board urges that In re Cowan, supra, is not supportive of respondent's position. Its attorney indicates he reviewed with the superintendent the charges filed by him and directed that the statements of the children be incorporated therein in order that the allegations against respondent might come directly from the mouths of the children involved without the necessity for paraphrasing by the superintendent.

The Board also avers that In re Kunz, supra, is clearly distinguishable from the instant matter because in Kunz the

Commissioner found fault with the superintendent for not supplying sufficient information from which probable cause could be found to support any charge against the respondent other than the fact she was arrested. In support of this, it cites the following passage from Kunz:

> The Board could not have evaluated the source of the Superintendent's information regarding the nature of a criminal charge against respondent, because the Superintendent did not provide the Board with his source of information. Consequently, the Board relied only upon a raw, unsupported suspicion that respondent was charged with possession and distribution of methamphetamine. Board evaluation of the source of the Superintendent's information is not a rigorous inquiry, nor is such an evaluation process a hearing on the merits. Rather, the evaluation process preceding a probable cause finding requires nothing more than a well-grounded suspicion, but not based on rumor, that the affected employee has engaged in wrongdoing. In Re Tenure Hearing of Kathleen Kunz, 1985 SLD [1770] (12-16-85), at p. 16.
>
> (Board's Reply, at p. 3)

The Board further urges that:

> The Superintendent submitted a statement under oath that certainly exceeded a well-grounded suspicion. His charges were based upon statements from the victims themselves; statements made to him, other administrators, and the Camden County Prosecutor. The majority of those statements were reduced to writing with the assistance of the Prosecutor's office (one was reduced to videotape), and all have been supplied to the respondent and the Commissioner of Education.
>
> Respondent submits that he has "great difficulty in ascertaining exactly what it is the Board complains of", and yet appears again to take the position that it would have been more proper to paraphrase the statements of the children involved, rather than to supply the allegations against the respondent in the words of the victims themselves.

> As to the contents of the victims' statements, the respondent is well aware of the physical contact complained of by the children involved and as included in the children's statements. His assertion, to the contrary, stretches the bounds of credulity. (Id., at pp. 3-4)

Upon review of the parties' arguments with respect to the sworn statement of evidence, the Commissioner finds and determines that the sworn statement does not meet the requirements of N.J.S.A. 18A:6-11. The superintendent's sworn statement reads:

> As the Superintendent of Waterford Township Schools, I make the following statement being duly sworn according to law, and upon my oath:
>
> 1. The School Administration has received complaints from several students/parents regarding treatment by Mr. David Borrelli, which statements have also been given to the Camden County Prosecutor's Office, copies attached hereto.
>
> 2. The statements above-mentioned leave me to charge Mr. David Borrelli with conduct unbecoming a teacher toward [A.M., L.R., E.K., A.G., S.B., K.S., B.B., D.M., and C.C.]

Attached to the above statement are copies of six warrants against respondent for various violations of N.J.S.A. 2C:14-2(b) and N.J.S.A. 2C:24-4(a) concerning sexual assault against a child and/or abuse of a child/endangering the welfare of a child. Also attached are copies of the statements given by six students and one parent to the Camden County Prosecutor's office. On November 28, 1989 the Board submitted a videotape of the interview of another student, K.S. by the County Prosecutor's office.

Unlike in In re Cowan, supra, the sworn statement by the superintendent in this matter does not set forth facts as told to

him by named individuals with personal knowledge of the complaints. Nor is there a sworn statement by any others in the "School Administration" who spoke to the nine students who had personal knowledge of the complaints. Thus, even the minimal requirements for a sworn statement of evidence set forth in Cowan have not been met in the instant matter. Further, while the statements made to the prosecutor's office were given by six students with personal knowledge of the factual allegations, the statements are neither signed, nor sworn to, by any of the six students, nor the parent who was interviewed, nor the investigator conducting the interviews. No sworn statements are provided with respect to two students, while another is by way of the videotape submitted after the certification of charges to the Commissioner. See also In the Matter of the Tenure Hearing of Charles Apkarian, School District of West New York, Hudson County, N.J. Superior Court, Appellate Division, A-927-86T8, decided November 20, 1987.

In view of the determination that the statement of evidence as required by N.J.S.A. 18A:6-11 is defective, the tenure charges against respondent are dismissed without prejudice. Such dismissal in no way precludes the Board from undertaking anew the process of tenure charges against respondent. Having reached this determination, it is not necessary to address the OPMA allegations by respondent. However, the Board is cautioned that it should strictly adhere to the requirements of that act. Any action taken with respect to the tenure charges must be at a duly constituted and properly announced closed session of the Board, N.J.S.A. 18A:6-11. As dictated by N.J.S.A. 10:4-13, action may not be taken at a

"caucus" session. The Board is also cautioned to adhere strictly to the requirements for service of the charges upon respondent, irrespective of any request of his attorney.

Lastly, the Commissioner notes for the record that respondent raises as an affirmative defense a claim of contractual violation with respect to the procedure for parental complaints. The Commissioner does not have jurisdiction over allegations of contractual violations. However, he does point out that statute supersedes contractual provisions and a contract provision may not contravene statute.

IT IS SO ORDERED this 23RD day of February 1990.

COMMISSIONER OF EDUCATION

FEBRUARY 23, 1990

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1453-89
AGENCY DKT NO. 345-11/88

JAMES GUERRA,
Petitioner,
v.
BOARD OF EDUCATION OF HUDSON COUNTY AREA VOCATIONAL AND TECHNICAL SCHOOLS
Respondent.

Sanford R. Oxfeld, Esq., for petitioner
(Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Alexander Booth, Jr., Esq., for respondent
(Brownstein, Booth & Diaz, attorneys)

Record Closed: December 1, 1989 Decided: January 4, 1990

BEFORE **EDITH KLINGER**, ALJ:

PROCEDURAL HISTORY

On November 1, 1988, James Guerra filed a petition of appeal with the Commissioner of Education, alleging that his tenure and/or seniority rights under *N.J.S.A.* 18A:28-5 were violated by the Board of Education of Hudson County Area

Vocational and Technical Schools (Board) when he was advised that his assignment as Apprentice Coordinator for the District was being terminated and he was transferred to the position of instructor of electronics. Respondent filed its answer to the petition of appeal on February 17, 1989, and on February 28, 1989 the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law for hearing as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

On July 18, 1989, petitioner filed an amended petition of appeal alleging that his position as instructor of electronics was terminated due to a reduction in force, in violation of his tenure and seniority rights. Petitioner was granted leave to amend his petition of November 1, 1988 in order to consolidate the two appeals for hearing.

After notice to all parties, a prehearing conference was held on April 19, 1989, at which time the matter was scheduled for hearing. The hearing took place on September 25 and 28, 1989, and the record was held open to allow the parties to submit briefs. The record closed on December 1, 1989, when the last submission was received.

The issues to be decided at hearing were:

1 Did the Board make an involuntary transfer of petitioner from a tenured position as Apprentice Coordinator to a position of electronics instructor without abolishing the position of coordinator?

2. Could the Board legally abolish the position of Apprentice Coordinator?

3. Did the transfer violate petitioner's tenure and seniority rights?

4. Did the Board violate petitioner's tenure and seniority rights when it abolished the position of electronics instructor?

5. To what relief, if any, is petitioner entitled?

UNDISPUTED FACTS

Most of the material facts in this matter are not in dispute and I **FIND** the **FACTS** set forth in the following summary to be uncontested.

Petitioner, James Guerra (Guerra), served as a teacher of electronics at the Hudson County Area Vocational and Technical School and acquired tenure and seniority in this position. He then served as the Cooperative Industrial Education (CIE) Coordinator for the district until 1983. In 1983, he was appointed to the position of Coordinator of Apprenticeship Training Programs, where he served until August 30, 1988. The parties do not dispute that the position of County Apprentice Coordinator is a tenurable position and that Guerra achieved a tenure status in that position by serving the requisite number of years.

In the spring of 1988, the District began to evaluate the merits of its participation in apprentice training. The purpose of the evaluation was to determine the cost effectiveness of the $50,000 anual salary expenditure for the coordinator position. At its August 23, 1988 meeting, the Board decided to abolish the Apprentice Coordinator position and transferred Guerra from this position to a position of instructor of electronics.

The Apprentice Coordinator position was a 12-month administrative position which paid an additional salary for the summer months. As a 12-month employee, Guerra accumulated 36 vacation days each year. The electronics position is a 10-month teaching position. There are no vacation days attached to it, and Guerra did not receive the additional salary, since a teacher does not work during the summer months.

At the time Guerra was transferred, there were only nine students, who were distributed between the two schools in the District, in the District apprentice program. No one replaced Guerra in the position. The principals of both schools were certified as coordinators of apprenticeship training programs and they were asked by the Board to take on whatever job responsibilities remained. The school bulletin continued to list Guerra as the Apprenticeship Coordinator during the 1988-89 school year. The position was not formally abolished by the Board until August 23, 1989.

Guerra received his official notice of transfer on August 24, 1988. He became ill immediately after that and he used 85 to 96 sick days between September and December 31, 1988. A substitute teacher of electronics was hired to replace him while he was on sick leave.

Prior to January 1989, Guerra met with Joseph Sirangelo, Assistant Superintendent for Business Administration for the Hudson County Vocational and Technical School District. Sirangelo told Guerra that he would be returned to the apprenticeship office to monitor apprenticeship agreements. He was given no classroom duties. Between January 1989 and March 1989, Guerra worked in the apprenticeship office. In March 1989, when he learned that he was reassigned to the electronics position, he went to a new doctor who said that he should remain out of work for another month.

No new apprenticeship agreements were executed in the District after August 23, 1988.

On June 30, 1989, Guerra's position as an electronics teacher at North Hudson Center was eliminated "due to a reduction in force and for reasons of economy and/or educational purpose."

COULD THE BOARD ABOLISH THE APPRENTICESHIP COORDINATOR POSITION?

The National Apprenticeship Act of 1937, codified at 29 *U.S.C.* 50, established the Bureau of Apprenticeship and Training (BAT) within the United States Department of Labor. The act delegated to BAT a myriad of responsibilities, including the registration of apprenticeship programs. Standards for the registration of such programs are codified at 29 *C.F.R.* §29.1-13. An "Apprenticeship Program" is defined at 29 *C.F.R.* 29.2(f) as an overall plan involving the process of qualification, recruitment, selection, employment and training of apprentices . The implementation of the Apprenticeship Programs is left to the states.

In New Jersey, the Apprenticeship Program (Program) is administered by the State Apprenticeship Council. The Commissioner of Education and the Commissioner of Labor and Industry are members of the Council. The Department of Education is responsible for providing related training as required by the Program

established in New Jersey under *N.J.S.A.* 34:1A-38. The Division of Vocational Education is the division of the State Department of Education involved with the Program. The training and instruction provided in the Program must comply with the Federal standards for apprenticeships. The standards are published in Labor Standards for the Registration of Apprenticeship Programs, 29 *C.F.R.* §29.1-13 (1977).

According to Robert D. Jacoby of the Division of Vocational Programs, State Department of Education, "apprentice training is a voluntary program and involves an agreement between an apprentice and his or her employer." Vocational schools enter into the Program on a voluntary basis. According to Jacoby, only if a vocational school chooses to operate an apprenticeship program must it be administered by an appropriately certificated person. Jacoby further stated that in counties that do not have an apprenticeship program, apprentices and apprentice sponsors are normally served by an adjacent county vocational system.

Employers must be registered with the Federal Bureau of Apprenticeship and Training because of the federal wage requirements of the Davis-Bacon Act and to insure that the apprenticeship program which they sponsor meets the eligibility requirements for federal purposes. Under the Federal regulations, 29 *C.F.R.* §29.2, a "sponsor is the person in whose name an apprenticeship program must be registered or approved." An "apprenticeship program" is a plan containing all terms and conditions for the qualification, recruitment, selection, employment and training of apprentices which includes such matters as the requirement of a written apprenticeship agreement. The federal scheme provides for the registration and/or approval of an apprenticeship program by BAT or a recognized State apprenticeship agency as meeting the basic standards and requirements of the Department of Labor for approval of these programs for federal purposes.

Under the statutory and regulatory scheme, an apprentice must register with the Program. The apprenticeship agreement must be registered, that is, accepted and recorded by BAT or the Program. Sponsors must register and/or seek the approval of the Program. A local school district is not an entity which must seek registration and/or approval of an apprenticeship program.

The State Department of Education is responsible for developing, organizing, supervising and maintaining approved programs of related instruction for all

eligible apprentices. In order to insure that an apprentice is offered related training and related instruction, and maintains satisfactory attendance in the apprenticeship program in which he is registered, cooperating public schools, through their Apprentice Coordinators, are charged with this non-delegable responsibility.

There is nothing in the statutory or regulatory scheme requiring the educational or related instruction component of an apprenticeship program to register with any agency. Programs of related instruction are simply those available in the local school systems in their regular vocational education programs, which meet the standards of the State Department of Education in regard to such courses; the related instructional component of an apprenticeship program needs no other state or federal approval.

There is a requirement for Apprenticeship Coordinators only in those school districts which choose to cooperate with the New Jersey State Department of Education, Division of Vocational Programs in participating in the Program. A non-cooperating school district need not participate other than by making its regular vocational courses available to apprentices.

I therefore **CONCLUDE** that a local school district is not required to have an Apprentice Coordinator unless it so chooses because the participation of a local district is purely on a voluntary basis. Since local school district participation needs neither registration nor approval, other than that which the State Department of Education normally requires for vocational subjects taught in the public school system, I **CONCLUDE** that there is no need for a local school district to go through a formal procedure when it decides to withdraw its voluntary participation. Accordingly, I **CONCLUDE** that a position of Apprentice Coordinator is not mandated by any State or Federal statute or regulation, and therefore may be abolished by a local school district in accord with its usual procedures for eliminating any other position in the district.

ABOLITION OF THE POSITION OF APPRENTICE COORDINATOR

A school district has the statutory authority to abolish a position, pursuant to *N.J.S.A.* 28:9, for reasons of economy because of a reduction in the number of pupils,

a change in the administrative or supervisory organization of the district, or for any other good cause.

In August of 1988, the Board made a preliminary determination that the position of Apprentice Coordinator was not required because of the small number of apprentices in the District participating in the program and, therefore, the significant expenditure necessary to maintain the program was not justified. Hudson County had received no State or Federal funding for the apprenticeship program since 1982. Petitioner's position that there would be more apprentices in the District participating in the program if there were an Apprentice Coordinator to recruit apprentices and sponsors is rejected. The Board has the managerial prerogative to abolish and create positions. *Dunellen Bd. of Ed. v. Dunellen Ed. Assn.*, 64 *N.J.* 17 (1973). It has the authority to restructure school administration in order to deploy its personnel in the manner most likely to promote the overall goal of providing a thorough and efficient education. It also has the power to determine who is best qualified to be appointed to a staff position, including an administrative or supervisory position. *Jablonsky v. Emerson Bd. of Ed.*, OAL DKT. EDU 6812-82 (Mar. 1983), adopted, Commissioner of Education (April 18, 1983). Petitioner's argument that he would expand the apprenticeship program if only he were allowed to continue in the position of Apprenticeship Coordinator is equivalent to the argument that he should be allowed to expand a function of the school district which the Board, in its managerial discretion, has decided for economic reasons that it does not want to perform at all; under no circumstances can the petitioner argue that the Board is obligated to maintain a position for the sole purpose of providing him with employment. His argument also overlooks the fact that the number of apprentices in the District decreased while he was incumbent in the position.

Petitioner further argues that since the Board did not formally abolish the position until August 23, 1989, it could not involuntarily transfer him to the available position of instructor of electronics, the other area of petitioner's certification.

The evidence shows that for all intents and purposes, the position of Apprentice Coordinator was abolished in August of 1988. No one was ever appointed to that position following the transfer of Guerra. The few duties that remained were ministerial, such as monitoring existing apprenticeship agreements, and these were distributed among the principals of the two high schools in the

District, both of whom were properly certificated. Guerra himself monitored these agreements on a temporary basis between January and March 1989, until it was decided his services were not necessary and he was returned to his teaching position. The Essex County Apprentice Coordinator could have assumed the duties of the position, if necessary. However, during the 1988-89 school year, the District did not find it necessary.

Monitoring an apprenticeship agreement only requires that a properly certificated representative of the District indicate by signing the agreement, that the individual's apprenticeship program is approved and meets the applicable standards. The District is not a party to the agreement. The certificated representative of the District is also required to certify that an apprentice has completed his related instruction at the end of his apprenticeship. There were only 9 apprentices in the District registered in apprenticeship programs during the 1988-89 school year.

Carol Brancato, Vocational Education Assessor for the District, was sent as its representative to one meeting of the Association of New Jersey Apprentice Coordinators (NJAC) during the 1988-89 school year. She never discussed the conference with Guerra and he never asked her about it.

Advertisements for the Hudson County Area Vocational and Technical Schools' Adult and Continuing Education program and school brochures for the 1989-90 school year mentioned the availability of the apprenticeship programs. The advertisements and the school brochures attracted only one inquiry.

It is of no significance that the name of James Guerra appeared as the Apprentice Coordinator for the District in the school brochures. The evidence shows that he continued to be designated in this manner by the company printing the brochures rather than by the District. Neither Guerra nor anyone else was paid to act as Apprentice Coordinator in the District during the 1988-89 school year. I **FIND** that the position of Apprentice Coordinator was abolished, in fact, if not formally, by the Board in August 1988.

> In the instant matter, the Board's error of procedure was that it did not formally act to abolish the two positions of coordinators, but instead merely did not reemploy respondents in those positions for the 1971-72 year. But the substance of a situation

and not its shape must control. *Board of Education of the Township of Madison v. Madison Township Education Association*, 1974 S.L.D. 488, 496.

The record further shows that the Board did not formally abolish the position of Apprentice Coordinator for approximately one year in order to study and assess the delivery of apprentice training without a coordinator. It was at its August 23, 1989 meeting that the Board made the final determination that the coordinator position was unjustifiable from an economic perspective and formally abolished it. I therefore **CONCLUDE** that the Board abolished the position of Apprenticeship Coordinator for reasons of educational efficiency and fiscal economy.

I further **CONCLUDE** that the fact that the few remaining duties of the position were distributed among other staff members does not invalidate the Board's actions. "Clearly, this is the precise situation which occurs when positions are abolished. The coordinators salaries would have constituted a gift of public moneys for services not rendered, which is clearly prohibited by the laws of this State." *Ibid.*

PROCEDURAL IRREGULARITIES

No evidence has been offered by petitioner that there were any procedural irregularities in the transfer of Guerra to the position of instructor of electronics on August 23, 1988 or in the elimination of the position of instructor of electronics for reasons of economy and/or educational purpose on June 30, 1989. Both acts were taken by resolution of the Board of Education of the Hudson County Area Vocational and Technical Schools. There was no proof of bad faith or of any ulterior motive in the transfer or the elimination of the instructor position.

I therefore **CONCLUDE** petitioner has not proved that his tenure and/or seniority rights were violated by the Board by its failure to follow any required procedure.

CONCLUSION

Based upon all of the above, I **CONCLUDE** that the respondent abolished the position of Apprenticeship Coordinator, effective September 1, 1988, and transferred petitioner to a position of instructor of electronics to which he was

entitled by virtue of his certification and seniority. I **FURTHER CONCLUDE** that absent any evidence to the contrary, the Board abolished the position of instructor of electronics legally, pursuant to *N.J.S.A.* 18A:28-9. Consequently, I **CONCLUDE** that petitioner is not entitled to any relief.

ORDER

It is therefore **ORDERED** that the appeal of James Guerra be and hereby is **DISMISSED WITH PREJUDICE**.

This recommended decision may be adopted, modified or rejected by **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10.

I hereby FILE this initial decision with **SAUL COOPERMAN** for consideration.

January 4 1990
DATE

Edith Klinger
EDITH KLINGER, ALJ

1/4/90
DATE

Receipt Acknowledged:
Seymour Weiss
DEPARTMENT OF EDUCATION

JAN 10 1990
DATE

Mailed To Parties:
Jacqui LaTrella
OFFICE OF ADMINISTRATIVE LAW

le/e

JAMES GUERRA,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions and the Board's reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner avers that many of the undisputed facts set forth by the ALJ are erroneous. He focuses on two which he deems to be particularly important. The first concerns the ALJ's finding that there were only nine students in the Apprenticeship Program who were distributed between two schools in the district. Petitioner maintains that during the 1987-88 school year, the last full year he was in the program, there were over 400 students in it. Further, he cites Exhibit R-1 as proof that as late as November 28, 1988, after his removal from the program, there were still 213 students in the program county-wide. The Board's reply exceptions do not dispute the correctness of petitioner's position on this point. It is therefore accepted by the Commissioner as a revised finding of fact in the matter based upon Exhibit R-1 which appears to be the sole document in the record with respect to numbers of students in the Apprenticeship Program in 1988.

The second undisputed fact reached by the ALJ to which petitioner strongly voices exception is found on page 3 of the initial decision and reads "***[t]he principals of both schools were certified as coordinator of apprenticeship training programs and they were asked by the Board to take on whatever job responsibilities remained." As to this he avers, inter alia, that:

> [t]here certainly was not one shred of evidence put into the hearing which indicated that the principal at either of the two vocational schools in Hudson County possessed the certification of a coordinator of apprenticeship programs. Further, there was no evidence that the Board at any time asked these individuals to take on whatever job responsibilities remained.
> (Petitioner's Exceptions, at pp. 3-4)

Moreover, petitioner avers that:

> As will be argued infra, it is mandated that the County Apprenticeship Coordinator perform the duties that Mr. Guerra performed and that even had the principals of the schools at one point in their educational experience received the certifications in question at no time were they ever given the responsibility as mandated by the statutes to perform the duties of the coordinator of apprenticeship training programs. In fact, during the hearing Mr. Guerra subpoenaed Mr. James Doran who was the principal at the North Hudson Center who candidly testified that he had no idea what apprenticeship training was about and that whenever he received a phone call he merely forwarded it to Mr. Serangelo, the Business Administrator for the district. It was quite clear that at least Mr. Doran had not the slightest idea of what the responsibilities were of an Apprentice Coordinator and it is clear that he was not certified in that area despite the "Undisputed Fact" as found by the Administrative Law Judge.
>
> In this regard, Mr. Guerra has knowledge that not one of the principals in any of the schools, either day or night, possesses his certificate as a coordinator of apprenticeship programs. It is acknowledged that that fact was not put into evidence. However, it is being offered because the facts that the Administrative Law Judge found as being in evidence were not put in evidence either. (Id., at pp. 4-5)

The Board's reply exceptions do not dispute the accuracy of petitioner's position, although the Board does close its exceptions with an objection "***to Petitioner's numerous allusions to matters outside the record." (Board's Reply Exceptions, at p. 2)

A review of the record does not reveal any document demonstrating or even averring that the principals of the two vocational schools were certified as Coordinator of Apprenticeship Programs. Given this and in the absence of any exception being taken on this point by the Board in its reply, the ALJ's statement is reversed.

Petitioner has not provided the Commissioner with the transcript of the hearing; thus, he is unable to review Mr. Doran's testimony directly. Under the Court's ruling in In re Morrison, 216 N.J. Super. 143 (App. Div. 1987), it is petitioner's obligation to provide a transcript in support of any exceptions which rely upon a witness's testimony. In the absence of such transcript, the Commissioner has insufficient information upon which to reverse the

ALJ on the issue of the principals' being asked to pick up the remaining duties of the Appenticeship Program.

Petitioner next sets forth his arguments and exceptions as to the ALJ's conclusion that a vocational and technical school has the right to abolish its entire apprenticeship program. Upon careful review of petitioner's arguments, the Commissioner is unpersuaded that the ALJ erred in her determination on this issue. Contrary to petitioner's assertion, the Commissioner does not agree that the ALJ failed to understand the difference between an employer in the sense of a participant in an apprenticeship training program and the vocational school as his employer. The program is voluntary for both the vocational school and the employer insofar as participation is concerned. Notwithstanding petitioner's averments otherwise, there is nothing in federal or state statute or code which prohibits the unilateral abolishment of an apprenticeship program by a school district.

Upon examination of the record and arguments with respect to the Board's failure to abolish the position of apprenticeship coordinator until a year after petitioner's transfer to a teacher of electronics position, the Commissioner rejects the ALJ's determination that the Board acted properly in effectuating the transfer because the position "***was abolished, in fact, if not formally, by the Board in August 1988." (Initial Decision, at p. 8) Petitioner was serving in a tenured position of Apprentice Coordinator. He could not be removed from that position and transferred to the separately tenurable position of teacher without his consent, the abolishment of the position (N.J.S.A. 18A:28-9) or the Tenure Employees Hearing Law (N.J.S.A. 18A:6-10 et seq.). Childs v. Bd. of Ed. of Township of Union, 1980 S.L.D., 1134, aff'd State Board 1981 S.L.D. 1404, aff'd N.J. Superior Court, Appellate Division, 1982 S.L.D. 1456; Wilma Colella v. Bd. of Ed. of Elmwood Park, 1983 S.L.D. 149, aff'd State Board 172, aff'd N.J. Superior Court, Appellate Division, 1984 S.L.D. 1921.

Decisions issued by the Commissioner of Education subsequent to Bd. of Education of Madison, supra, relied upon by the ALJ have ruled that a board of education must act formally to abolish a position. Breese v. Bd. of Ed. of the Borough of Jamesburg, Middlesex County, decided by the Commissioner March 13, 1980; Fujarcyk v. Bd. of Ed. of the City of Newark, Essex County, decided by the Commissioner January 12, 1981; Donn v. Bd. of Ed. of the City of Newark, Essex County, decided by the Commissioner April 30, 1981

Consequently, the Commissioner determines that petitioner's August 1988 transfer from the position of Apprentice Coordinator to that of teacher was ultra vires, absent formal action under N.J.S.A. 18A:28-9 to abolish the coordinator position. Therefore, petitioner is entitled to the differences in salary and emoluments between the teaching and coordinator's positions until the date in August 1989 upon which the Board took formal action under that statute.

In his exceptions, petitioner complains that the ALJ never made a determination of petitioner's tenure and seniority rights for the three positions he filled in the Board's employ, i.e., that of an electronics teacher, CIE coordinator, and county apprenticeship coordinator. (Petitioner's Exceptions, at p. 22) He also complains that the ALJ ignored that fact that in one year he was (1) "terminated" from the apprenticeship coordinator position, (2) transferred to a CIE coordinator position which was subsequently abolished, and (3) transferred to the electronics teacher position which was also abolished and he is thus no longer employed by the Board despite 13 years of service. (Id.)

First, it is noted that petitioner does not argue that there is any individual with lesser seniority than he serving in any of the above positions. Thus, he has not set forth a claim requiring a determination of the Commissioner as to his tenure and seniority rights beyond the issue of the apprenticeship coordinator already determined herein. Second, it is pointed out that there is no allegation that the CIE coordinator position or electronics teacher position was improperly abolished. Third, the ALJ did rule on page 10 of the initial decision that the abolishment of the latter position was done legally.

Accordingly, petitioner is to be placed on the preferred eligibility list for each of the positions for which he has acquired tenure and shall be reemployed pursuant to his tenure and seniority rights as set forth in N.J.A.C. 6:3-1.10 whenever a vacancy occurs for which he has entitlement.

The Board is ordered to pay to petitioner forthwith the difference in monies and emoluments as set forth above, less mitigation of any monies earned from June 30, 1989 to the date in August 1989 on which the Board formally acted to abolish the Apprentice Coordinator position.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JAMES GUERRA,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE HUDSON COUNTY AREA VOCATIONAL-TECHNICAL SCHOOLS, HUDSON COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	
	:	

Decided by the Commissioner of Education, February 24, 1990

For the Petitioner-Appellant, Balk, Oxfeld, Mandell & Cohen
(Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Brownstein, Booth & Diaz
(Alexander Booth, Jr., Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

July 5, 1990

Pending N.J. Superior Court

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6137-88
AGENCY DKT. NO. 258-8/88

WILLIAM S. KELLER,
Petitioner,
v.
BOARD OF EDUCATION OF THE ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION,
Respondent.

Arnold S. Cohen, Esq., for petitioner (Oxfeld, Cohen, Blunda ,. Friedman, LeVine and Brooks, attorneys)
Edward F. Petit-Clair, Esq., for respondent

Record Closed: January 16, 1990 Decided: January 19, 1990

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

The petitioner was tenured and the most senior wood shop teacher employed by the Essex County Educational Services Commission (Commission), however at the end of the 1987-1988 school year, his employment ended as part of a reduction of force.

During the 1988-1989 school year, the Commission employed a teacher certified only in art as a "vocational outreach instructor" See, N.J.A.C. 6:11-6.2(a)2. The petitioner, who is certified as a teacher of industrial arts, a teacher of the handicapped and a teacher of production, personal or service occupations, alleges that the duties of the "vocational outreach instructor" were such that his certifications were appropriate for the position. See, N.J.A.C. 6:11-6.2(a) 13; 6:11-23iii and 6:11-27. He therefore contends that, given his seniority, the Commission wrongfully failed to offer him the position and he demands back pay for the period he was unemployed. See, N.J.S.A. 18A:6-51 et seq.; N.J.S.A. 18A:6-66; N.J.S.A. 18A: 28-5 and N.J.S.A. 18A:28-9 et seq.

The Commission submits that: (1) the petitioner does not hold the proper certification for the subject position (See, N.J.A.C. 6:11-6.2(a)13); (2) because it is reimbursed by way of a State Department of Education grant for 75% of the salary paid for the subject position, it is not subject to the petitioner's claim for money damages (backpay) based upon his tenure and seniority rights; and (3) even if the petitioner is entitled to employment in the subject position, the Commissioner of Education lacks jurisdiction to determine what salary should be paid to the petitioner.

PROCEDURAL HISTORY

On August 2, 1988, the petitioner filed with the Commissioner of Education a petition of appeal from the Commission's refusal to honor his request that he be employed as the vocational outreach teacher. The Commissioner transmitted the matter to the Office of Administrative Law (OAL) where, on August 17, 1988, it was filed as a contested case. See, N.J.S.A 52:14B-1 et seq.; N.J.S.A. 52:14F-1 et seq. and N.J.A.C. 1:1-3.1. See also, N.J.S.A. 18A:6-9. On September 29, 1988, the matter was the subject of a prehearing conference and thereafter a prehearing order was entered.

On January 4, 1989 the first day of hearing was held in the OAL's Newark office. The case could not be completed and was adjourned at the end of that day. After I left numerous unanswered messages for the petitioner's attorney (in an effort to schedule another day for hearing), I set September 25, 1989 as a date for same. The final day of hearing did take place on September 25, 1989 in the OAL's Newark office.

The petitioner's post hearing memorandum was submitted on November 9, 1989 and after a delay caused by petitioner's attorney's illness, the Commission's post hearing memorandum was submitted on January 16, 1990.

FINDINGS OF FACT

Based upon the stipulated facts, the witnesses' testimony and the exhibits in evidence, I **FIND** the following **FACTS:**

In 1968 petitioner received a bachelor's degree in industrial arts education from Kean College, where he took courses in woods, drafting, printing, pictorial displays, photography and graphic communications. Petitioner's graphic communications course involved learning to teach vocational students to use type, hand operated presses and silk screen printing. His photography course involved learning to use chemicals and techniques for enlargement, design, print and transfer.

The petitioner is certified as a teacher of industrial arts, a teacher of the handicapped, and a teacher of production, personal or service occupations. See, P-1, P-2 and P-3.

The Commission is an agency, established pursuant to statute, "for the purpose of carrying on programs of educational research and development and providing to public school districts such educational and administrative services as may be authorized pursuant to rules of the State Board of Education. N.J.S.A. 18A:6-51(a).

From 1981 until 1988, the petitioner was employed by the Commission as an industrial arts (woodshop) teacher. See, N.J.S.A. 18A:6-40 and N.J.A.C. 6:11-6.2(a)13. See also, P-1.

In 1986, Mark Solimo, the Commission's "grantsman," learned that funds were available from the Department of Education and he completed and submitted an application in that regard wherein he sought a grant for a "vocational outreach program." See, P-18.

The application proposed that the Commission would "furnish(es) a certified vocational instructor (Industrial Arts/Special Education) to conduct direct on-site vocational instruction for [special education] students at nine public school facilities in four school districts in Essex County ..." "Activities [would] include direct instruction in Drafting, Electricity, Food Services, Woodshop/Carpentry, Auto Mechanics, Small Engines, Graphic Communications, Office/Business, Horticulture, Plumbing, Masonry and plumbing occupational areas." See, P-18, page 4. The proposed activities were also described as involving: "experimenting, designing, constructing, evaluating, [and] using tools and machines". See, P-18, page 30.

In the fall of 1986, the Department of Education approved the application and on November 24, 1986, the Commission hired Kennis Fairfax as its "vocational outreach instructor", although he was certified only as a teacher of art and not as an industrial arts teacher, which was required by the approved application. See, P-7, P-8 and P-12.

From December 1986 to February 1987, meetings were arranged between the Commission's employees and those of the schools (in Essex County) whose students were to be served by the vocational outreach teacher. During this time, Mr. Fairfax met with the other schools' employees, and for the first time, particular students were identified as the types who would benefit by the program. Also during this time, a schedule of classes was developed.

In December 1986, i.e., before it had fully developed its structure for performance pursuant to its first grant, the Commission began to draft its application for a second grant, i.e., for the 1987-1988 school year. Given the deadline for its submission, the second application was largely a "cut and paste job," based upon the first application, i.e., again a "certified vocational instructor (Industrial Arts/Special Education) . . ." was proposed. Compare, P-17 and P-18.

From January to June 1987, Mr. Fairfax travelled to the scheduled classes in Essex County where he consulted with teachers and taught classified special education students to measure, make jewelry boxes, sand wood, glue clock parts together from kits, silk screen, take photographs and do other "simple crafts."

The Department of Education approved the Commission's second application and the Commission again employed Mr. Fairfax as its "vocational outreach instructor during the 1987-1988 school year." During this time, Mr. Fairfax performed substantially the same duties as he had during the January to June 1987 period.

Although he was not certified to do so, Mr. Fairfax taught classified special education students in the vocational outreach program. See, P-17, page 1, paragraph 10 and P-18, page 1, paragraph 10. See also, N.J.A.C. 6:11-6.2(a)23. Given their limited ability levels, the simple tasks assigned by Mr. Fairfax for artistic expression were appropriate for building self esteem in these students. Nonetheless, it must be said that the Commission did not comply with the terms of the approved application, which proposed vocational skills, taught by a "certified vocational instructor (Industrial Arts/Special Education) . . . ." See, P-17, "Abstract," page 1.

Warren Buehler, the executive director of the Commission, recognized that the activities and instructional services provided by Mr. Fairfax were not those shown in the approved applications, and that Mr. Fairfax was not a certified industrial arts teacher which was also proposed in the application. Mr. Buehler, therefore, instructed Mr. Solimo that the Commission's third (and final) application should be prepared so that it would more accurately show the services to be provided.

The third application, which was for the 1988-1989 school year, was submitted on or about January 27, 1988, and it did differ somewhat from the first and second applications. For example, the first and second applications' "Abstracts" state that the proposed "vocational outreach program" would furnish a "certified vocational instructor (Industrial Arts/Special Education) to conduct direct on-site vocational instruction ..." See. P-17 page 1, and P-18, page 4 [Emphasis added.] The third application's "Abstract" states that the proposed "vocational outreach program" would furnish "an instructor to conduct on-site vocational instruction ...", i.e. with no mention of what certification the instructor would have. See, P-16, page 1.

The first and second applications' "Abstracts" also state that the proposed activities would include direct instruction in drafting, electricity, food services, woodshop/carpentry, auto mechanics, small engines, graphic communications, office/business, horticulture, plumbing, masonry and plumbing occupational areas. See P 17, page 1 and P-18, page 4. See, also, P-17, page 2 paragraph 5 and P-18, page 20,

paragraph c.3. [Emphasis added.] The third application's "Abstract" states that the proposed "Activities [would] include direct instruction in drafting, woods, graphic communications and photography areas." See, P-16, page 12.) [Emphasis added.] In other words, the instructional areas and activities were reduced and some trade or vocational areas were eliminated in the third application. (See, P-16, page 18 paragraph 2.)

The third application, however, continued by its own terms to seek State Department of Education funds to "continue to provide a vocational outreach program ..." See, P-16 memorandum to: Administrators of Private/Parochial Schools in Essex County, "from: Mark Solimo, date: January 4, 1987, subject: non public school participation in 94-142 Grant Proposal 1988-89" [Emphasis added.] The third application also promised "vocational instruction" to "prepare(s) students with key occupational competencies for future employment." See, P-16, page 1. Finally, the Commission cannot show that "art" instruction was the essential nature of the purpose described in the application for the 1988-1989 funding. Instead, it consistently refers to "vocational" education, training and skills; "career(s)"; and "occupational cluster(s)." See, P-16, at e.g., page 8, et seq. and page 24, et seq.

During the 1987-1988 school year, petitioner, who was the Commission's most senior industrial arts teacher, was again employed as a woodshop teacher in the Commission's Essex Senior Academy. See, N.J.S.A. 18A:28-5. In this class, he taught the use of equipment such as woodlathes, band saws and circular saws. During his years as a Commission teacher, however, the petitioner had previously taught other skills He certainly had the ability to teach the classified students to measure, etc. as Mr. Fairfax had done in the vocational outreach program. Further, the petitioner, unlike Mr. Fairfax, was certified as a teacher of the handicapped. See, P-2.

On April 30, 1988 the Commission served notice upon the petitioner and others employed by the Essex Senior Academy that the school would be closed, that there would be a reduction in force (RIF); and that they would not be employed after June 30, 1988. See, N.J.S.A. 18A:28-9, et seq.

Following notice of the RIF, the Department of Education approved the Commission's application for a grant for the proposed vocational outreach program during the 1988-1989 school year.

Because Mr. Buehler felt that the approved 1988-1989 school year program called for an instructor certified in art, he did not notify the petitioner that the "vocational outreach instructor" position was available to him, despite his tenure, seniority and "bumping" rights. Nonetheless, prior to the 1988-1989 school year, the petitioner asserted the right to employment as the vocational outreach teacher and by August 2, 1988, he had filed the petition that instituted this matter. See, N.J.S.A. 18A:28-12.

During the 1988-1989 school year, Mr. Fairfax was again employed by the Commission as its "vocational outreach instructor." He performed substantially the same duties as he had during the previous school years and he was paid $26,859 for 1988-1989, $20,517 of which was reimbursed to the Commission by the Department of Education by way of the grant. See, P-6.

Since September 1988, the petitioner has worked as a substitute teacher, for which he was paid per diem. From November until mid-December 1988, however, he was unable to work, due to a double hernia. His total income for substitute teaching at the time of his testimony in January 1989, was approximately $2,000.

The petitioner did not apply for any full- time teaching positions for the 1988-1989 school year, because of his hope that he would be reemployed by the Commission in this regard. For example, the petitioner declined to contact the Cedar Grove school system in response to a November 8, 1988 telephone call from Mr. Buehler who notified him that a "woodshop" position was available. See, R-1. The petitioner also declined to respond to a March 10, 1989 letter from the Morris County Education Center wherein an industrial arts position was offered at $27,075 for the 1988-1989 school year and $28,445 for the 1989-1990 school year. See, R-2.

The Department of Education grant is available for no more than three school years and the grant for the 1988-1989 school year was the third for the Commission. Also, the Commission does not employ an industrial arts teacher for the current (1989-1990) school year. Therefore, there is no dispute that the petitioner's claim relates only to the 1988-1989 school year.

LEGAL DISCUSSION AND CONCLUSIONS

Statutes and regulations require that the Commission employ a teacher who holds a teacher's certificate which is appropriate for the duties to which he is assigned. See, N.J.S.A. 18A:3-15.6; N.J.S.A. 18A:6-38; N.J.S.A. 18A:6-40; N.J.A.C. 6:11-3.1, and N.J.A.C. 6:11-6.2(a). This is in keeping with the student's right to a thorough and efficient education. See, N.J.Const., (1947), Art. VIII §4, par 1.

Where a tenured teacher has been dismissed as part of a reduction in force, he shall "remain upon a preferred eligible list in the order of seniority for reemployment whenever a vacancy occurs in a position for which [he] shall be qualified [i.e., for which he holds an appropriate certificate] and he shall be reemployed by the body causing dismissal . . . ." See, N.J.S.A. 18A:28-12.

Given the above, two central questions in this matter include: (1) What was the nature of the duties of the "vocational outreach instructor," pursuant to the "vocational outreach program" to be offered by the Commission during the 1988-1989 school year? and (2) Given the nature of the duties of the "vocational outreach instructor," are the petitioner' certifications appropriate for that position? The answer to the second question must be "yes" for the petitioner to succeed.

Here, the Commission has obtained funding from the Department of Education pursuant to applications which: (1) for the 1986-1987 school year, specified that a "certified vocational instructor (Industrial Arts/Special Education). . ." would provide "vocational instruction for [special education] students . . ." (2) for the 1987-1988 school year, again specified that a "certified vocational instructor (Industrial Arts/Special Education . . ."would provide "vocational instruction" for handicapped students; and (3) for the 1988-1989 school year, specified that an "instructor to conduct . . . vocational instruction . . ." would again provide "vocational education" for special education students to "prepare(s) [them] with key occupational competencies for future employment," P-16, P-17 and P-18.

I **FIND** and **CONCLUDE** that the duties specified in the approved applications must govern this matter, not the Commission's well intentioned practice of departing from those specifications (by utilizing Mr. Fairfax's art skills). In that regard, not only is

Mr. Fairfax's art certification inappropriate for the duties required by the approved applications, I **FIND** and **CONCLUDE** that the petitioner's certifications as a teacher of industrial arts, teacher of the handicapped and teacher of production, personal or service occupations are appropriate, given the plain meaning of the words describing those certifications.

Given the fact that the petitioner had tenure and did hold appropriate certificates, N.J.S.A. 18A:28-12 required that the Commission offer to reemploy him in the position as "vocational outreach instructor" for the 1988-1989 school year, and I must **FIND** and **CONCLUDE** that the Commission failed its duty in this regard.

Subject to his duty to mitigate his damages by earning income elsewhere, I **FIND** and **CONCLUDE** that the petitioner (and not Mr. Fairfax) is entitled to the $26,859 salary paid for the 1988-1989 school year. See, in this regard, N.J.S.A. 18A:26-2 and N.J.A.C. 6:11-3.1(a). That is, I **FIND** and **CONCLUDE** that the Commission cannot escape its liability to the petitioner, based on the fact that $20,517 of the $26,859 wrongfully paid to Mr. Fairfax was received from the State Department of Education.

Relative to mitigation, the petitioner credibly and reasonably testified that he hoped and expected that the Commission would see the error of its ways and offer him the vocational instructor position, and he therefore declined to pursue possible opportunities in other school districts. (Given the petitioner's tenure with the Commission, it is understandable that he wished to remain an employee with that body and given the date of his demand for reemployment in the subject position, he reasonably hoped and expected to be reemployed during the 1988-1989 school year.) Also, subject to his temporary disability due to a double hernia, the petitioner did engage in substitute teaching. Therefore, I **FIND** and **CONCLUDE** that the petitioner did reasonably mitigate his damages and that the Commission is liable to him in the amount of $26,859, less the petitioner's income earned during the 1988-1989 school year.

By virtue of the Commissioner's statutory authority to hear and determine all controversies and disputes arising under school laws, I **CONCLUDE** that the Commissioner does have jurisdiction over this matter. N.J.S.A. 18A:6-9. I also **CONCLUDE** that the Department of Education grant of reimbursement for part of the vocational outreach teacher's salary cannot insulate the commission from liability for its wrongful conduct.

ORDER

I **ORDER** the Commission to pay to the petitioner $26,859, less the petitioner's income earned during the 1988-1989 school year. The amount of this earned income will be determined by petitioner submitting to the Commission documentation relative to his said income.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

DATE 1/24/90 — **JOHN R. TASSINI, ALJ**

Receipt Acknowledged:

DATE 1/24/90 — DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE JAN 24 1990 — OFFICE OF ADMINISTRATIVE LAW

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WILLIAM S. KELLER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE ESSEX COUNTY EDUCATIONAL SERVICES COMMISSION, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Commission's exceptions were untimely filed pursuant to N.J.A.C. 1:1-18.4. Consequently, petitioner's reply exceptions were also not considered in the Commissioner's review of this matter.

Upon careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that petitioner's certifications as a teacher of industrial arts, teacher of the handicapped, and teacher of production, personnel or service occupations were appropriate for the duties described as "vocational outreach instructor" as found in the approved grants bestowed on the Commission through the Department of Education. He further finds that the art certification held by the person hired for the position during the 1988-89 school year was not appropriate.

Consequently, because petitioner is tenured with the Commission and did hold the proper certifications, N.J.S.A. 18A:28-12 entitles him to reimbursement for his having been improperly denied said position, less mitigation as discussed by the ALJ for the year in question.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5031-88
AGENCY DKT. NO. 185-6/88

LYDIA PIERRE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,
Respondent.

Arnold M. Melik, Esq., for petitioner (Wills, O'Neill & Melik, attorneys)

William R. Miller, Esq., for respondent (Miller & Kinney, attorneys)

Record Closed: January 4, 1990 Decided: January 19, 1990

BEFORE **JOHN R. TASSINI**, ALJ:

STATEMENT OF THE CASE

Petitioner Lydia Pierre was employed as a "noninstructional classroom aide" in the school system of the Irvington Board of Education ("Board"). Her employment was pursuant to a collective bargaining agreement and she submits that she was wrongfully terminated by the Board in violation of "due process" requirements of "State and Federal law" because the Board refused her demand for a hearing relative to the termination. Petitioner moves for an order compelling the Board to grant her such a hearing, etc.

The Board cross-moves, submitting (1) the petition was filed out-of-time under N.J.A.C. 6:24-1.2 and (2) the petitioner has no right to the hearing demanded so the

petition fails to state a claim upon which relief can be granted and therefore, must be dismissed. See, N.J.A.C. 1:1-3.1 and R. 4:5-4.

PROCEDURAL HISTORY

On February 5, 1988, the Board gave written notice to the petitioner that her employment was terminated, effective March 1, 1988. See, J-2. By its letter dated February 16, 1988, the Irvington Education Association requested a hearing for petitioner, i.e., an opportunity for petitioner to appear before the Board's Personnel Committee to explain her circumstances and thereby avoid termination. See, J-3. On February 24, 1988, the Board voted unanimously to terminate petitioner. On March 22, 1988, the Board denied the petitioner's request for a hearing. By its letter dated March 22, 1988, the Board responded to the Irvington Education Association's letter requesting a hearing by promising to "review" the matter and respond with a decision. See, J-4. By its letter dated April 5, 1988, the Board notified the Irvington Education Association that, among other things, "the termination stands" and a hearing would not be granted in view of the fact that the "contract with (petitioner's) bargaining unit has a grievance procedure for this purpose." See, J-1 and J-5.

On June 21, 1988, the petition on appeal from the Board's failure "to provide petitioner with a hearing as required by State and Federal law," was filed with the Commissioner of Education. On July 5, 1989, the Board's answer and defenses were so filed. See, N.J.S.A. 18A:6-9.

The matter was transmitted to the Office of Administrative Law ("OAL") where, on July 7, 1988, it was filed as a contested case. See, N.J.S.A. 52:14B-1 et seq.; N.J.S.A. 52:14F-1 et seq.; and N.J.A.C. 1:1-3.1. On September 30, 1988, the matter was the subject of a prehearing conference and a prehearing order was entered thereafter. At the mutual request of the attorneys, the matter was adjourned from its original hearing dates to allow the filing of cross-motions for summary decision and dismissal. See, N.J.A.C. 1:1-12.5; N.J.A.C. 1:1-1.3; R. 4:6-2(e); and R. 4:46-2.

On November 20, 1989, petitioner's papers in support of her motion were filed and, on December 8, 1989, the Board's papers were filed. The motions were the subject of an unrecorded telephone conference on January 4, 1990, during which the facts were stipulated to and after which the Board filed as an exhibit (in addition

to those already received with the motion papers) the parties' agreement (of June 19, 1986). The record was then closed.

FACTUAL FINDINGS

Based upon the parties' stipulations and the exhibits referred to, I **FIND** the following **FACTS**:

On November 18, 1987, the Board and the Irvington Education Association entered into a written agreement whereby, for the period from September 1, 1987 to August 31, 1989, the petitioner was employed as a "non-instructional classroom aide," which is not a "teaching staff member" position. See, J-1.

The written agreement provides, among other things, that the Board "retains and reserves unto itself, without limitation, all powers, rights, authority, duties and responsibilities conferred upon and vested in it by laws and constitution of the state of New Jersey and of the United States, including, but without limiting the generality of the foregoing, the right" to "dismissal" of an employee. See, J-1, page 3.

On February 5, 1988, the Board served petitioner with a letter with the following statements:

> Since there has been no dramatic change for the betterment in your attendance during the 1987-1988 school year, as agreed upon by you and the Irvington Education Association on July 30, 1987, your employment as a Para-professional is terminated, effective March 1, 1988.
>
> As of this date, your attendance record shows sixteen (16) days' absence. Additionally, your teacher's written evaluation of November 11, 1987 from Principal Rusak indicates your job performance needed improvement. See, J-2 [emphasis added.]

In this regard, the petitioner admits that the Board complied with the employment agreement's requirement of 10-day notice before termination.

By its February 16, 1988 letter, the Irvington Education Association notified the Board of its "request" for "an opportunity for (petitioner) to address the (Board's) Personnel Committee to explain the hardship and personal circumstances, which caused her problems on the job." See, J-3.

During its February 24, 1988 public meeting, the Board voted unanimously not to continue the petitioner's employment, effective March 1, 1988.

By its March 22, 1988 letter, the Board responded to the Irvington Education Association's February 16, 1988 letter as follows:

> With regard to Lydia Pierre, it is most difficult for the Personnel Committee to hear various appeals as requested by employees; bearing in mind we have an excess of twelve hundred employees, we leave these matters to our administrators.
>
> In this particular case, I am requesting that Mr. Addison, Director of Governmental Programs, provides me with Lydia's personnel folder and the reasons for termination to afford me an opportunity to review this matter. Rest assured that I will respond with recommendation or decision. See, J-4 [emphasis added.]

By its April 5, 1988 letter, the Board notified the Irvington Education Association as follows:

> Sandra Fox, Board President and I had an opportunity to review Lydia Pierre's personal (sic) folder with Administrators as indicated in Mrs. Fox's letter to you dated March 22, 1988.
>
> Her employment record with this school district has a history of extremely poor attendance, poor evaluations for work performance and despite opportunities to improve, as you are aware, nothing changed to the better.
>
> Accordingly, both Mrs. Fox and I agree that the termination stands and a hearing before the Personal (sic) Committee would serve no purpose since the contract with her bargaining unit has a grievance procedure for this purpose. Said grievance machinery was used to reinstate Lydia Pierre following a meeting with Albert Cohen, Duputy (sic) Superintendent of schools at which time she was reinstated using the grievance procedure.
>
> If you have any questions regarding Ms. Pierre, please feel free to call me. See, J-5 [emphasis added.]

No grievance procedure was ever utilized by or for the petitioner. See, J-1, page 4, et seq. This action is the only means by which petitioner seeks to assert her claim and it was instituted by the filing of the petition on June 21, 1988.

LEGAL DISCUSSION AND CONCLUSIONS

The Board has moved for dismissal of the petition, submitting that it is out-of-time and that it fails to state a claim upon which relief can be granted. See, N.J.A.C. 6.24-1.2, N.J.A.C. 1:1-1.3; and R. 4:6-2(e). The petitioner moves for summary decision, submitting that she does state a claim and that the facts justify the relief demanded. N.J.A.C. 1:1-12.5.

Motions to dismiss or for summary disposition are an efficient means of disposing of litigation, available when the petition is out-of-time, when it fails to state a claim or where there are no genuine issues of material fact. However, such a motion must be carefully considered. The burden of proof is upon the movant and all reasonable inferences must be drawn in favor of the opponent of the motion, whose papers must be indulgently treated. See, R. 4:46-2 and Judson v. Peoples Bank and Trust Co. of Westfield, 17 N.J. 67, 73-75 (1954).

1. The Motion to Dismiss the Petition As Out-Of-Time under N.J.A.C. 6:24-1.2

Assuming that the petition did state a claim, it would have to be filed within the time line of N.J.A.C. 6:24-1.2, which states:

> (b) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing. [Emphasis added.]

Here on February 5, 1988, the Board served upon the petitioner the written notice of termination, i.e., well more than 90 days before the petition was filed on June 21, 1988. There is a question, however, as to whether the start of the 90-day period should equitably be delayed from February 5, 1988 to a later date within 90 days preceding the June 21, 1988 filing date.

Intentionally protracted negotiations may justify estoppel of a defendant from reliance on a statute of limitations, where that defendant unconscionably planned thereby to defeat the action. See, Friedman v. Friendly Ice Cream Co., 133 N.J. Super. 333 (App. Div. 1975). No such plan appears to be alleged against the Board and therefore it would appear that the motion to dismiss the petition as out-of-time could be granted. On the other hand, there was communication from the Board, as

late as March 22, 1988, wherein the Board represented that the matter would be reviewed and that it would respond with a "decision." Thereafter, on April 5, 1988, i.e., within 90 days of the filing of the petition, the Board sent its final communication that "the termination stands." Thus, drawing all inferences against the movant Board and in favor of the petitioner and treating the petitioner's papers indulgently, I must **FIND** and **CONCLUDE** that there is a material issue of fact that requires denial of the motion to dismiss the petition as out-of-time.

2. The Motion to Dismiss the Petition for Failure to State a Claim upon Which Relief can be Granted

The petitioner makes the broad statement that the Board's termination while refusing her a hearing on the matter violates her rights to "due process" under "State and federal law." Significantly, however, the petitioner cites no statute, regulation or case law whereby a nonteaching staff member (support) employee would be entitled to a hearing relative to her termination. Rather, the petitioner urges that the right of a hearing should be extended to her, as a matter of "elemental fairness," because, e.g., a nontenured teaching staff member is entitled to a statement of reasons for the Board's refusal to reemploy. See, Donaldson v. Board of Education of North Wildwood, 65 N.J. 236 (1974); N.J.S.A. 18A:27-3.2; and N.J.A.C. 6:3-1.20. The petitioner, however, is not situated similarly to teaching staff members, whose duties and services are more essential to the school system and whose employment rights have been extended by the Legislature.

School boards, now more than ever, are in need of flexibility as they attempt to perform their duties. The discretion to employ and terminate personnel is essential for this flexibility, so that boards are not further bogged down by the time, efforts and paperwork that inevitably accompany "hearings," etc. If the Legislature wished to impose upon the boards the additional burden of hearings relative to termination of nonteaching staff members, it would have done so. See, Helen K. Jungblut v. Board of Education of the Township of Delaware, 1981 S.L.D. 499. Given the conspicuous absence of any statute or regulation providing for the relief the petitioner demands, I must **FIND** and **CONCLUDE** that the petitioner here is entitled to no such hearing and that the petition does fail to state a claim upon which relief can be granted.

Moreover, (1) the petition does not even allege the necessary, underlying claim that the Board's termination of petitioner was unreasonable, in bad faith, etc.; (2) the collective bargaining agreement specifically reserves to the Board all powers, rights, etc., relative to "dismissal"; and (3) the petitioner did not pursue the grievance procedure that might have been available to her. All of these factors further require dismissal of the petition as failing to state a claim upon which relief can be granted.

ORDER

For the above reasons, I **ORDER** dismissal of the petition for failure to state a claim upon which relief can be granted.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

1/19/90
DATE

JOHN R. TASSINI, ALJ

Receipt Acknowledged:

1/9/90
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 24 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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LYDIA PIERRE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF IRVINGTON, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioner maintains that the Commissioner should reverse the ALJ's conclusion that a non-teaching staff member is not entitled to a hearing before the Board relative to termination of employment and urges that he extend Donaldson, supra, to nontenured instructional aides. Petitioner also urges that the Commissioner reject the ALJ's notion that an informal appearance before the Board would overburden boards of education in need of flexibility as they attempt to perform their duties. As to this, petitioner avers that there can be no rational distinction between a nontenured teacher and a noncertificated instructional aide with regard to a request for a informal appearance before the board relative to termination of employment.

Upon review of the record in this matter, the Commissioner adopts the ALJ's conclusion that petitioner is not entitled to a hearing before the Board with regard to her termination. Whether the issue of non-teaching staff members being accorded the right to an informal hearing before a board of education relative to termination goes to the need of a board to have flexibility in its hiring and firing of employees and to be free from undue burden is essentially irrelevant and speculative at best. What is controlling is the fact that the Legislature, if it so wished, could have accorded the right to such informal appearances before boards of education to non-teaching staff members as well, but it did not.

Therefore, the Commissioner adopts as his own the ALJ's finding and conclusion that "[g]iven the conspicuous absence of any statute or regulation providing for the relief the petitioner demands, I must FIND and CONCLUDE that the petitioner here is entitled to no such hearing and that the petition does fail to state a claim upon which relief can be granted." (Initial Decision, at p. 6)

Accordingly, the Petition of Appeal is dismissed with prejudice.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4366-89
AGENCY DKT. NO. 153-5/89

WILLIAM T. WAGNER,
Petitioner,
v.
OLD BRIDGE TOWNSHIP
BOARD OF EDUCATION
Respondent.

Sanford R. Oxfeld, Esq., for petitioner (Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks)

Scott T. Smith, Esq., for respondent (Wilentz, Goldman & Spitzer)

Record Closed: December 5, 1989 Decided: January 19, 1990

BEFORE **DANIEL B. MC KEOWN**, ALJ:

William T. Wagner (petitioner), a teacher with a tenure status who following disposition of tenure charges was returned to employment with the Old Bridge Township Board of Education (Board), alleges in a two count Petition of Appeal filed to the Commissioner of Education on May 22, 1989 that his salary for 1988-89 was established at a rate lower than that to which he was entitled and that his salary for 1989-90 was subsequently improperly established and, in count two, petitioner alleges the Board improperly denied him appointment to a coaching position. The Board denies petitioner's allegations and seeks to dismiss at least the first count on the basis the complaint alleged therein is time barred under N.J.A.C. 6:24-1.2(b).

After the Commissioner transferred the matter on June 13, 1989 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq., a telephone prehearing conference was conducted August 1, 1989 during which the issues of the case were decided. A hearing was conducted December 4, 1989 at the South River Borough Hall Court Room. The record closed December 5, 1989.

FACTS

The facts as established by a preponderance of credible evidence are these regarding petitioner's salary establishment and his claim for a coaching position.

Petitioner has been employed as a teacher of health and physical education for many years. Petitioner also was the head coach of the high school coed winter track team. During November 1986 school officials began an investigation of certain complaints filed against petitioner by several of his pupils. Thereafter, petitioner resigned as head coach of the coed winter track team and he was eventually suspended with pay on or about December 11, 1986 pending a completion of the investigation into the complaints. Thus, from December 11, 1986 forward petitioner provided no teaching service to the Board for the remainder of the 1986-87 year.

On August 3, 1987 the Board certified to the Commissioner six charges of conduct unbecoming a teaching staff member against petitioner. The Board simultaneously suspended petitioner from his teaching duties without pay under N.J.S.A. 18A:6-14 but on January 19, 1988 an arbitrator ruled that the Board was obligated under its agreement with the Old Bridge Township Education Association to pay petitioner his salary during the suspension pending disposition of the tenure charges. Following a plenary hearing held in the matter by this judge, an initial decision was issued May 16, 1988. Thereafter, the Commissioner on June 22, 1988 in his final decision held as follows:

> Accordingly, the Commissioner adopts as his own those findings and conclusions set forth in the initial decision which find respondent [petitioner] guilty of conduct unbecoming a teacher but which impose a penalty of less than dismissal from his tenured position. The penalty shall be loss of 120 days' salary and salary increments during 1986-87 and 1987-88.

The dispute centers about the imposition of the Commissioner's discipline on respondent and the subsequent result on his actual salary for 1988-89 and 1989-90. At

The Board sought clarification from the Commissioner on "*** whether the Commissioner had intended to retroactively withold respondent's salary increments or whether such salary reductions should take effect as of the 1988-1989 school year." The Commissioner advised the Board on July 20, 1988 that the discipline to be imposed against petitioner should not deviate from the penalty recommend by this judge in the initial decision. The recommended discipline to be imposed upon petitioner by this judge is as follows:

> Accordingly, given all the circumstances in this matter, a fair and reasonable discipline to impose upon respondent is a reduction in salary in an amount equal to 120 days of salary together with the loss of salary increments respondent would have earned during 1986-87 and 1987-88 had the present charges not been brought against him. Such salary reduction shall go into effect for the 1988-89 academic year when respondent is reinstated to his position as a teacher in the Board's employ as of September 1, 1988.

At the time petitioner was suspended by the Board on August 3, 1987 pending disposition of the tenure charges against him, his salary for 1987-88 was already established at $38,575, which corresponds to step 18 of the Board's 1987-88 salary guide for those teachers who possess a masters degree plus 30 credits. Following the Commissioner's decision on the tenure charges, petitioner was reinstated to his teaching position September 29, 1988. His salary at that time for 1988-89, retroactive to September 1, 1988, was established at step 18 of the Board's 1987-88 masters plus 30 guide, or the amount of $38,575, the same amount petitioner was earning at the time of his initial suspension. The Board's 1988-89 masters plus 30 salary guide at step 18 commands a salary of $40,375. Petitioner provided no teaching service to the Board from December 4, 1986 through September 28, 1988. Petitioner refused to sign his salary statement (P-4) given him by the Board for 1988-89 which called for a salary of $38,575. Petitioner says he advised the then superintendent of schools he would not sign the salary statement for 1988-89 because the salary was inaccurate. Note that the Petition of Appeal in this case was filed at the Department of Education May 22, 1989.

Petitioner's salary for 1989-90 was established by the Board at the level of $45,325 which corresponds to step 19 of the Board's 1989-90 masters plus 30 salary guide. The petitioner's argument is that because he was retained at step 18 for 1987-88, the same step he was on for 1986-87, his salary for 1989-90 should be established according to step 20 of the Board's 1989-90 master plus 30 salary guide. Without being placed on step

20 for 1989-90, the evidence shows petitioner is not presently eligible for a longevity payment for having reached the final step in his appropriate salary guide.

In regard to a coaching position, petitioner notes that he applied to be a coach of the high school track team but was denied that opportunity on or about November 4, 1988 (P-5); he applied for a coaching vacancy for the girls' spring track team on March 14, 1989 (P-6); that he applied to be a coach of the freshman boys basketball team, assistance girls' spring track team, or the assistant baseball coach on June 21, 1989 (P-7); and, he applied to be head coach for the boys spring track and field team, along with the position of assistant coach for the baseball team (P-8). In all respects, petitioner was not successful in his application. The evidence also shows that the Board did appoint a certificated teacher from an adjoining school district to be assistant girls track coach as of April 26, 1989 (R-3). The present superintendent testified that petitioner had talked with him several times regarding coaching positions and advised him he would not presently recommend him for appointment to such a position but perhaps he may do so in the future. The superintendent explained he did not recommend petitioner for appointment to any of the coaching positions because of the charges which had earlier had been filed against him which emanates from pupil complaints and the subsequent decision on those charges.

ANALYSIS

In regard to the Board's motion to dismiss count one of the petition, at least regarding petitioner's 1988-89 salary, that portion of the complaint must be dismissed through the application of N.J.A.C. 6:24-1.2(b). That regulation provides as follows:

> The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

In this case, petitioner had notice September 28, 1988 of his salary for 1988-89. Despite the fact petitioner did not sign the salary statement and more likely than not complained to the superintendent of the asserted error in the his 1988-89 salary, the petition of appeal regarding the 1988-89 salary was not filed unit May 22, 1989, clearly more than 90 days from the date of September 28, 1988 when petitioner received notice of the action which is the subject of his requested hearing. Consequently, petitioner's

claim of an improper salary for 1988-89 must be dismissed as having been filed out of time under N.J.A.C. 6:24-1.2.

Nevertheless, petitioner's salary for 1989-90 is a claim filed in time under the rule. Therefore, petitioner's 1989-90 salary claim must be adjudicated.

The discipline recommended by this judge for the infractions found to have been committed by petitioner provides that for 1988-89 his salary was to be established as if he earned no salary increments for 1986-87 and for 1987-88. The result is that his salary was to have been established for 1988-89 at step 17 of the 1988-89 masters plus 30 credit guide, or $38,895. That is petitioner was to have been paid in 1988-89 according to the appropriate 1988-89 salary guide as if he earned no salary increments for 1986-87 or 1987-88. The result is that petitioner's salary was to have been established according to step 17, the step he was at during 1986-87, but according to the then existing 1988-89 salary guide upon his reinstatement.

Such discipline imposed upon petitioner was for the 1988-89 school year only. Petitioner's salary for 1989-90 was then to be established at step 20 of the 1989-90 masters plus 30 credit salary guide, or the amount of $48,190, absent an increment withholding in 1988-89. This conclusions is consistent with the Commissioner's prior ruling in Beam v. Sayreville Board of Ed, 1975 SLD 993, 995. Accordingly, petitioner's salary for 1989-90 must be established according to step 20 of the Board's 1989-90 masters plus 30 credit salary guide.

In regard to petitioner's claim for appointment to a coaching position, I **FIND** no basis upon which to conclude petitioner is entitled to such appointment. N.J.A.C. 6:29-6.3 authorizes boards of education to employ "*** any holder of a New Jersey teaching certificate to work in the interscholastic athletic program provided that the position has been advertised." In this case, petitioner's sole claim to a coaching position is that his experience qualifies him for such position.

In view of the circumstances of this entire case, including the tenure charges proved true against him, I **FIND** no basis upon which to conclude the Board acted improperly or contrary to State Board rule denying petitioner appointment to any coaching position for which he applied nor do I find anything improper in the Board appointing an out-of-district certified teacher to be a coach assigned to one of the vacancies to which petitioner made application.

In conclusion, petitioner's salary claim for 1988-89 is dismissed as having been filed out of time. Petitioner's salary for 1989-90 must be established according to step 20 of the Board's 1989-90 masters plus 30 credit salary guide or $48,190. Petitioner's claim for appointment to a coaching position is dismissed.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 19, 1990
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

1/17/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 24 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

tmp

WILLIAM T. WAGNER,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

For the reasons which follow, the Commissioner accepts the ALJ's determinations with regard to the timeliness of petitioner's filings and his claim of improper denial of a coaching position. The Commissioner rejects, however, the ALJ's analysis and conclusions regarding petitioner's proper salary placement for 1989-90.

With respect to the timeliness of the first count of the instant petition (the timeliness of the second not being at issue), petitioner's claim for the 1988-89 school year is clearly filed well beyond the 90-day limit established by law. Petitioner's refusal to sign his September 28, 1988 salary statement, together with his communication to the superintendent shortly thereafter, represents both an explicit awareness of the Board's final position and a clear acknowledgement of his disagreement with it; neither is there any evidence of subsequent attempts at local resolution that might have justified a delay in tolling the 90-day limit. There is, therefore, no reason for petitioner to have waited nearly eight months before filing a complaint before the Commissioner. Failure to timely file for 1988-89, however, does not affect that portion of petitioner's complaint dealing with 1989-90. His cause of action for 1989-90 centers on the Board's refusal to make him fully whole, as he had expected, following discipline imposed in 1988-89 per the Commissioner's prior decision in his tenure matter. Because he did not become aware of the Board's position until he received his 1989-90 guide placement on April 28, 1989, his petition of May 22, 1989 is timely filed for purposes of 1989-90 salary.

With respect to petitioner's claim of having been improperly denied a coaching position, the Commissioner concurs with the ALJ's finding that the Board's decision was both a reasonable exercise of its discretionary authority and fully consistent with law. Thus, no cause of action has been put forward that would warrant the Commissioner's intervention.

With respect to the merits of petitioner's salary claim, however, the Commissioner cannot concur with the ALJ's determination. In affirming the ALJ's decision in petitioner's prior tenure matter (In the Matter of the Tenure Hearing of William T. Wagner, School District of the Township of Old Bridge, Middlesex County, decided June 22, 1988), the Commissioner construed the relevant language as follows: Upon petitioner's reinstatement in 1988-89, his salary placement was to be set as if he had been subject to increment withholding determinations in 1986-87 and 1987-88, years in which he provided virtually no service to the Board; that is, he would be deemed to have been held for two years (1987-88 and 1988-89) at the level attained by virtue of his 1985-86 service (Step 17) and, then, absent further withholding action, permitted to return to normal movement along the current negotiated guide. Thus, his placement for 1988-89 would be at Step 17 and, absent action by the Board to restore the withheld increments, his placement for 1989-90 would be at Step 18, each according to the salary guide negotiated for that particular year.

This understanding differs from that of the ALJ in one crucial respect: The ALJ evidently intended for petitioner, after suffering a reduction during 1988-89, to be restored in 1989-90 to the salary guide placement he would have held (Step 20) had there never been any disciplinary action taken against him at all. (Initial Decision, at p. 5, citing Beam, supra) In the years since the decision relied upon by the ALJ, however, the Commissioner and the Court have consistently recognized that, absent specific Board action to restore previously withheld increments, the affected staff member will always lag behind the salary step where he or she would have been placed had increment(s) not been withheld; and that this results not from a continuing violation each year, but from the effect of earlier employment decision(s). North Plainfield Education Association (Koumjian et al.) v. North Plainfield Bd. of Ed., 96 N.J. 587 (1984), at 595, Cordasco v. East Orange Bd. of Ed., 205 N.J. Super. 407 (App. Div. 1985), at 411 The Commissioner saw in the actual language of petitioner's tenure decision no indication that the ALJ intended the effect of his penalty to be for one year only; if he had, he would have rejected such provision as an inappropriate infringement on the discretionary rights of future boards and a directive contrary to the holdings of North Plainfield, Cordasco and their progeny.

Accordingly, the initial decision of the Office of Administrative Law is reversed to the extent that petitioner's salary for 1989-90 is to be established at Step 18 of the 1989-90 negotiated salary guide, absent a determination on the part of the Board to restore one or both of the previously withheld increments. The Petition of Appeal is, in all other respects, dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

WILLIAM T. WAGNER,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF OLD BRIDGE, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 2, 1990

For the Petitioner-Appellant, Balk, Oxfeld, Mandell & Cohen (Sanford R. Oxfeld, Esq., of Counsel)

For the Respondent-Respondent, Wilentz, Goldman & Spitzer (Scott T. Smith, Esq., of Counsel)

This is an appeal from a decision of the Commissioner of Education, in which the Commissioner reiterated, inter alia, the penalty imposed by his prior decision in tenure proceedings against Petitioner. In the Matter of the Tenure Hearing of William T. Wagner, decided by the Commissioner, June 22, 1988. In that decision, the Commissioner found that Petitioner herein was guilty of conduct unbecoming a teacher, but that, rather than dismissal, the appropriate penalty was loss of 120 days salary and increments for 1986-87 and 1987-88. Based thereupon, the Commissioner determined that Petitioner's proper placement in 1989-90 would be at step 18 of the district's salary guide negotiated for that particular year. Specifically, as reaffirmed by the Commissioner in his decision in the instant matter:

> Upon petitioner's reinstatement in 1988-89, his salary placement was to be set as if he had been subject to increment withholding determinations in 1986-87 and 1987-88, years in which he provided virtually no service to the Board; that is, he would be deemed to have been held for two years (1987-88 and 1988-89) at the level attained by virtue of his 1985-86 service (Step 17) and, then, absent further withholding action, permitted to return to normal movement along the current negotiated guide.

Commissioner's Decision, at 9-10.

We have carefully considered the arguments of counsel, and, based thereon, the State Board of Education affirms the decision of the Commissioner for the reasons expressed therein.[1]

July 5, 1990

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[1] We note that this case does not present for our review a situation in which a district board acted to withhold the increments of a teaching staff member pursuant to N.J.S.A. 18A:29-14, see generally Lulewicz v. Board of Education of the Township of Livingston, decided by the State Board of Education, November 5, 1989, appeal pending (App. Div.), but rather involves a penalty imposed by the Commissioner in tenure proceedings pursuant to N.J.S.A. 18A:6-10 et seq.

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 2727-89
and EDU 3733-89
AGENCY DKT. NOS. 107-4/89
and 147-5/89
(CONSOLIDATED)

DONAL REEVES ON BEHALF OF HIS MINOR CHILDREN, J.R., J.R., C.R. AND J.R.,
Petitioner,
v.
BOARD OF EDUCATION OF EWING TOWNSHIP, MERCER COUNTY,
Respondent; and

BOARD OF EDUCATION OF EWING TOWNSHIP, MERCER COUNTY,
Petitioner,
v.
DONAL REEVES,
Respondent.

Donal Reeves, petitioner, *pro se*

Russell Weiss, Jr., Esq., for respondent (Carroll & Weiss, attorneys)

Record Closed: December 8, 1989 Decided: January 18, 1990

BEFORE **NAOMI DOWER-LABASTILLE**, ALJ:

On April 10, 1989, Donal Reeves petitioned the Commissioner of Education to grant emergent relief against the Board of Education of Ewing Township (Board), which had disenrolled his four children from Antheil Elementary School on grounds that they lived in Trenton. On April 14, 1989, the Commissioner transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

A hearing on the emergent relief request was held on April 21, 1989. I granted the relief by a decision on the record, finding that Reeves was likely to prevail on the merits under *N.J.S.A.* 18A:38-1 and that denying the children the right to finish the school year in Ewing would work irreparable harm.

On May 17, 1989, the Board filed a petition seeking tuition payment from Reeves for his children's schooling in Ewing. This petition was transmitted to the OAL on May 23, 1989 and consolidated with the first petition because the issue of the children's residence is the same in each case. A prehearing was held on June 29, 1989. A discovery dispute was adjudicated by order on July 12, 1989. A hearing was scheduled for July 24, but on July 21, Reeves' counsel withdrew from the case. Reeves appeared *pro se* and requested adjournment stating that a new attorney was reviewing the file and he needed more time. Adjournment was granted and the hearings were rescheduled to October 17, 30 and 31, 1989. Donal Reeves, *pro se*, and his wife Anna appeared and gave testimony on their own behalf on October 17, 1989. The Board presented one of its witnesses.

On October 30, 1989, Reeves did not appear and did not advise the ALJ or opposing counsel of the reason for his nonappearance. Board counsel appeared with four witnesses. After waiting one hour, I requested Board counsel to attempt to contact Reeves to ascertain he would appear on October 31, 1989. Counsel reported he was unable to reach Reeves, having tried his home number several times, left a message at one place of Reeves' employment and having contacted Anna Reeves. Mrs. Reeves stated that her husband was working as a driver on a weekend bus tour but was aware of the Monday hearing date. She had not spoken to her husband since Thursday and did not know why he did not appear but stated she would attempt to contact him. I concluded that I would not dismiss the Reeves' petition or assume it had been withdrawn since he had appeared on two dates and concluded all his testimony. I determined to assume that Reeves voluntarily absented himself and thus waived cross-examination of the Board's final witnesses.

We proceeded *ex parte* to conclusion on October 31. The Board moved for expenses for appearance on October 30, 1989.

On November 6, 1989 I advised Reeves in writing of what I had ruled and gave him an opportunity to dispute waiver of his presence and of cross-examination by November 20, 1989. I explained that the Board would file a brief and Reeves would then have an opportunity to file a statement. The Board filed its brief on December 1, 1989. Reeves had one week to respond. When the record closed on December 8, 1989, Reeves had submitted no statement. A list of exhibits entered into evidence is appended to this decision.

The Issue

N.J.S.A. 18A:38-1 provides that public schools are free to any person domiciled within the school district (a), and any person whose parent, even though not domiciled within the district, is residing temporarily therein (d). The Board claims that the four Reeves children reside for a majority of the time with their mother in Trenton. Reeves claims that his four sons reside with him, spending a majority of school nights at his home in Ewing. The Board contends that Reeves has failed to prove that his children reside with him on a majority of school nights, that his testimony and that of his wife were uncorroborated by the testimony of other family members and neighbors who would know the facts and that Reeves was an unreliable witness who was not credible.

The Board went to considerable effort in its brief to point out inconsistencies in Reeves' testimony: it cited his allegedly "manipulative behavior," selective memory, evasiveness, and alleged quick fabrications. At the time I granted emergency relief to Reeves, it was because I found him very credible. Although the Board did indeed raise doubts as to credibility in cross-examination during a hearing on the merits, I do not agree that Reeves was evasive. I saw in him a very stubborn individual who is shrewd, notwithstanding his lack of higher education, and who was not about to let a lawyer put words in his mouth. It is normal for persons with these characteristics to resist cross-examination in various ways, one of which is to insist upon repeating language previously used if they recall it. It is also not uncommon for some persons not to recall the exact words they may have used a short time previously, *i.e.* to have short term memory deficits.

As an example of selective memory, the Board cites Reeve's insistence that his wife dropped the children off at the Woodland Avenue, Ewing, school bus stop on only one occasion. It subsequently became clear that Reeves definitely remembered one day when his wife did that, but she herself did not remember that day when they discussed their recollections. Reeves' testimony was that the children often came into the Woodland Avenue house for breakfast when Mrs. Reeves brought them from Trenton. Thus Reeves may have been defining the question differently from Board counsel. Finally, there is the distinct possibility that Reeves himself may not have been aware of more than one occasion when this occurred because he was not at home at the time. He conceded that it might have been "a few" times, namely, a lot less than the 25 or 50 figure Board counsel used in his questioning. Thus I do not agree with Board counsel's proposition that it was "wholly unreasonable" for petitioner to have been unable to estimate how many times his wife dropped the children off at school "when he was so certain she dropped them at the bus only once" (Brief, at page 32).

I did not find any inconsistency in Reeves' testimony about where his brother Joe lived. It must be recalled that Reeves owns the Ewing property with the cottage and big house. Before Reeves separated from his wife, fixed up the cottage and moved his children there, various relatives (out of ten brothers and sisters) were living on the property, including his brother Joe. When Reeves needed the cottage, Joe could stay in the big house with other relatives. When Reeves needed someone to stay with the children, Joe would stay in the cottage. Joe then decided to get married and rented a property on Greenwood Avenue but still came to the cottage when Reeves needed someone to stay with the children. Joe changed his mind about getting married, however, and moved back to the Ewing property two months before the hearing (*i.e.*, in late summer 1989). At time of hearing Reeves and his wife were trying to find a house to rent in Ewing. In this factual context, when Reeves stated "So, my brother Joe is interested in keeping the cottage," (brief at 38-39), it is obvious that:

(a) If Reeves and his wife rent a house, Joe will live in the cottage;
(b) Reeves has always allowed Joe to stay in the cottage unless Reeves needs the space at a particular time since he couldn't keep the children there without Joe's help due to his work schedule;
(c) When Reeves needs the cottage, Joe stays in the big house. Under these circumstances of complete family cooperation, there would be nothing unusual about Joe's keeping quite a few of his clothes in the cottage,

since he would need them to get dressed the next morning and go to work without disturbing anyone in the big house.

I see nothing nefarious, inconsistent or incredible about the testimony concerning these family arrangements.

Thus I found petitioner quite credible at hearing. The only point in time at which Reeves' candor was in question was the point at which he registered the children in Ewing on September 6, 1988. At that time he indicated the children lived at Woodland Avenue, Ewing, whereas he had not actually moved them in yet. This is inconsistent with his later response on the form affidavit of October 17, 1988 that he intended to occupy the premises within 60 days with his children and wife (B-1). At hearing, it was Reeves' position that, since he intended to move the children in as soon as he could complete arrangements, he considered that they were residents. He considered himself a resident there and he had changed his driver's license address by mid-October. The reasonableness of this position is colored by the fact that Reeves owned the property and had a right to live there.

The Board's investigators' observations and testimony were not disputed. They will be related in my findings below.

The ultimate finding of fact which will be dispositive is whether or not the Reeves children spend the majority of school time with their father in Ewing. Many other facts either support or detract from the Reeves' credibility or provide inferences for ultimate findings. Most of these underlying facts I have taken directly from Reeves' testimony. To avoid reiteration I will state these facts only in my findings.

Findings of Fact

1. The Reeves have four sons: C.R., J.R. and seven year old twins, J.R. and J.R.

2. The Reeves children attended Mercer Christian Academy for two years prior to their registration with the Ewing school system in September 1988.

3. Prior to school year 1988-89, the Reeves family lived together at 228 N. Warren Street in Trenton. Mrs. Reeves teaches school in Hamilton Township. She also

participates in social activities and church activities; she sometimes has rehearsals from 6:30 p.m. to 9:30 p.m. on two or three week nights.

4. Reeves himself has three different jobs. He drives charter tour buses, during the winter ski season. Thus, between November and April, Reeves is usually out of town on weekends. He also assists the director of a large funeral home in the evenings as needed. During the day, especially off season, he is a self-employed drywall worker. Initially, he performed services for others, but in the summer of 1989 he decided to expand this line of work so that it would eventually become his principal job, thus regularizing his work hours and enabling him to spend more time with his children.

5. In the spring of 1988, a fire severely damaged the two upper floors of the Reeves' Trenton home; the insurance company disputed payment of a $22,000 claim. The Reeves did not have enough money to repair all the damage but managed to repair one bedroom. (T32-11 to 34-6).

6. Reeves also owned a residential property at 106 Woodland Avenue in Ewing, which contained two residences: one was a house in which various family members of Mr. Reeves lived and the other was a small cottage at the rear of the lot which had been the home of Mr. Reeves' grandmother until her death a few years earlier. The Reeves had marital differences of opinion and Mr. Reeves moved into the Ewing cottage prior to August 1988.

7. After the fire claim dispute arose, Reeves told his wife that he could no longer afford to send the children to private school. He was adamantly opposed to having the children attend Trenton Schools or travel Trenton streets alone. In a former family relationship he had a son who died and he is very protective of his four sons. He felt that if they lived with him, he could at least go jogging with them and take them out for breakfast early in the morning before he went to work.

8. Reeves told his wife that since he lived in Ewing anyway, he would finish the attic for an additional bedroom in the Ewing cottage, have the boys live with him and register them in Ewing for school year 1988-89. He hoped that she would move out of Trenton and live with him.

9. Mrs. Reeves did not want to move away from the Trenton home for several reasons: although it had only one undamaged bedroom left, it had a good kitchen and laundry facilities; the Ewing cottage was too small; and the Trenton home is convenient for her mother, who comes there three days a week during the school year, does the wash, fixes the children's clothes, cleans and cooks dinner so that Mrs. Reeves can maintain her work schedule. Additionally, Mrs. Reeves dislikes the dark and is very allergic to insect bites, particularly mosquitoes which are plentiful around the Ewing property. Mrs. Reeves disliked the Ewing property for that reason and because the area is unlighted.

10. Reeves could not sell the Trenton home until it was repaired, couldn't repair it until the insurance claim was settled and by the summer of 1989, a tax sale had been held and the mortgage holder commenced a foreclosure action. Although Mrs. Reeves agreed to move to Ewing in the fall of 1989, the couple has to maintain a presence at the Trenton property, which Mr. Reeves began to use a base for his small contracting business.

11. When Reeves registered his four children in Ewing for the 1988-89 school year on September 6, 1988 he intended to prepare the Ewing cottage so that his sons could live with him.

12. When Reeves conferred on October 4 with Board officials, after they questioned residence of his sons on September 27, 1988, he wanted to make very sure that his children would fulfill residency requirements. He signed an affidavit of their intention to reside in Ewing within 60 days on October 17, 1988.

13. After Reeves spoke to attendance officer Richardson and Personnel Services Director O'Brien on December 2, 1988, his understanding was that if his children spent most school nights in Ewing by December 16, they fulfilled the residency requirements. Reeves changed his motor vehicle license address to Ewing, fixed up the bedroom and tried to have the children stay with him four out of five school nights.

14. The School Board had a duly adopted policy on proof of residency and future residents eligibility (B-7) which provided that if residency was not established in 60 days, tuition must be paid. It also stated: "The Board reserves the right to

review monthly the circumstances alleged to have caused the delay in establishing residency and to withdraw attendance permission at any time."

15. Due to the extraordinary work schedule Reeves and his wife had, it was extremely difficult for both to meet the scheduling needs of his new living arrangements. They cooperated fully, as did their families. Mr. Reeves' brother often stayed with the children at night at the cottage. Reeves hired a Louisiana Avenue neighbor to baby sit the children from the time they got off the school bus until his wife could pick them up at about 4:30 p.m. They often finished their homework while they waited for her.

16. After Mrs. Reeves picked up the children in the late afternoon, she drove them to their activities, which included karate and trumpet lessons, sports and church choir. She (or friends) then took them to the Trenton house for dinner, helped with their homework and drove them back to Ewing. If her husband was working that night, she waited until his brother Joe got home to the cottage before returning to Trenton.

17. On most weekends, the children stayed with their mother in Trenton because their father was out of town driving charter buses or doing construction work. On days Mrs. Reeves did not teach school, such as summer vacations, she looked after the children at her home in Trenton.

18. If Mr. Reeves was out of town on a school morning, such as Mondays or Fridays, or if he had to leave for work before the school bus came, his wife would feed the children and deliver them to school from Trenton if they spent Sunday night with her; if they were in Ewing, she would come there, feed them breakfast and get them ready for the school bus; occasionally she fed the children in Trenton and delivered them to the bus stop in Ewing. If there was a rain storm or snow, Mrs. Reeves might keep the children in Trenton. She did not want them to wait outside for the school bus because they had inadequate clothing for heavy rain.

19. Reeves would sometimes deliver the children to Trenton if he had to leave for work very early; his wife would give them breakfast and deliver them back to Ewing. Reeves would also pick up the children at his wife's home and bring them back to Ewing at night, depending on this work schedule.

20. The sleeping accommodations at both houses were inadequate for five or six persons because only one real bedroom was available in each house. The boys often seemed to prefer to sleep together on the floor like a communal group. The children regarded themselves as living in Trenton because their mother and father preferred to keep private their marital differences and did not tell the children they were "separated," formal custody arrangements were never made because Reeves always believed he would be able to convince his wife to live with him.

21. Despite the space constrictions, the Ewing cottage had more of the amenities of home because it was on a larger lot, with a number of close relatives living in the big house, and playmates near by in a safe neighborhood.

22. There were times during the period September 1988 to December 1988, when the children did not spend a majority of school nights in Ewing. During this period Reeves was buying bedding and fixing the upstairs bedroom of the cottage; he was of the understanding from school officials that his intentions that the children reside in Ewing, even if not completely effectuated, would be sufficient to meet the mandates of Board policy until December 18.

23. There was another period of two and a half weeks from mid September to mid October 1989 when the children did not stay in Ewing a majority of school nights. Reeves started his own drywall construction business in the summer of 1989, fixing up the Trenton premises as a base of operations. He continued his night work with the funeral home when needed. His employer had an accident, injured himself and was on crutches in September; Reeves began working every night, often until one or two in the morning to help out and his brother Joe was not available every night to stay with the children in Ewing (2T 36-37). Reeves and his wife were too tired to transport the children back to Ewing at night during this period.

24. By the time school opened in September 1989, both the Reeves had agreed that they would live together in Ewing and use the Trenton premises, as long as they were able to do so, for the construction business. They considered adding to the cottage, but realized it would take too long so they sought rental housing in Ewing. They hoped to have a lease by the date of hearing in October and to move in by November 1, 1989. Both acceptable properties they

found were not ready in time. They intend to move into the first of the two which is ready for occupancy (2T 11-12).

25. Agents of the Board made observations on twenty two dates during their surveillance of the Reeves' properties. There were also ten drive by observations.

26. Only the thirteen observations between January 18, 1989 and June 8, 1989 are for periods during which petitioner claims his children spent the majority of their school nights in Ewing. Three earlier observations were made during the period in which petitioner had to implement his intention to move the children to Ewing. The five last observations were made within a period of about two weeks during which petitioner admitted the children stayed on the Trenton premises most of the time.

27. Of the thirteen relevant observations during the claimed residency period, one was on a Monday, which was a weekday in winter (January 23, 1989) when the children most likely were in Trenton Sunday night because their father was on a charter bus tour.

28. Of twelve remaining observations, four were made by Richardson, who watched only the Trenton premises around the time children would be expected to leave for school between 7:30 a.m. to 8 a.m. On these dates, January 18, January 19, February 23 and May 12, 1989, no one watched the Ewing cottage or either premises very early in the morning to see if the children were driven from Ewing to Trenton due to their parents' early work schedule on those days. The observations of children being driven to Ewing were between 7:41 and 7:57 a.m. (2T173 to 179).

29. Mikalauskas, the Board's new attendance officer, made drive by observations in Ewing between 8:10 and 8:15 a.m. and saw the children at the bus stop six or seven out of ten times. Once he saw Mrs. Reeves come out the front door of the cottage. The children left via the back door (3T47 October 16, 1989, 8:11 a.m.). On October 17, and October 19, 1989, he saw the children come out of the Ewing cottage (3T47-48).

30. Mikalauskas saw the children arrive at the Ewing property at 3:30 p.m. on September 18, 1989. Between 7:15 a.m. and 8:30 a.m., he watched the

Trenton property on six days: September 26, 27, 29, October 3, 4 and 5, 1989. Although this was a period during which Reeves admitted the children were probably not in Ewing a majority of the time, Mikalauskis only saw the children in Trenton on three of six dates: September 29, October 3 and October 5 (3T40-45). The investigators did not see the children come out of the Ewing house on any of these dates and saw them at the bus stop only on October 5. The Board's hired investigators coordinated surveillance at the Ewing cottage, watching both the front and back doors beginning at 4:30 a.m. on seven dates: May 23, May 24, May 25, May 31, June 1, June 6 and June 8, 1989. Children were observed leaving the Ewing home only on June 6 but they were at the bus stop on May 31 (3T55-59).

31. Since the Reeves did not keep a record of where their children slept and why on each school night, they were unable to recall why the children were in Trenton six nights during the period May 23 through June 8, 1989, although they could explain a similar situation which occurred shortly prior to hearing.

Summary Findings

32. The Reeves planned to have the children stay with their father in Ewing four out of five school nights a week but, based on their testimony, the children did stay in Ewing on the average of three nights a week although circumstances dictated that they stay with their mother in Trenton most nights during a two week period just prior to hearing.

33. Based on the testimony of both parents that the children were sometimes driven from Ewing to Trenton at dawn, due to their parents work schedules, and then back to Ewing, on the days observations were made only between 7:45 and 8 a.m. in Trenton, the children may have stayed overnight in Ewing.

34. Six observations based on thorough surveillance during one period May 23 through June 8, 1989 are insufficient to disprove the testimony of both parents that the children stayed in Ewing a majority of school nights.

35. By virtue of Reeves' failure to advise that he would not appear on October 30, 1989, the Board's counsel, who charges $95 per hour, and two investigators, who charge $30 per hour, spent one and one half hours attending court. The

allowed cost for attendance is $90 for the investigators and $142.50 for counsel. (Total $232.50).

Conclusion and Disposition

I agree with the Board's argument that it cannot be expected to provide a greater surveillance sample. In every other factual context which I have heard or reviewed, the Board's surveillance would have been dispositive. The facts here are unique. The detailed testimony of the Reeves' exhausting personal schedules is not fabricated. It came from both parents, one of whom is a teacher. Not only the parents, but relatives, neighbors and friends cooperated with the parents to maintain the schedule to the extent it was possible.

The testimony of Anna Reeves threw a broader light on their motivations which, at first, appeared to be solely an intention to obtain a free public education in Ewing. While both parties were understandably reticent in revealing the marital differences which caused petitioner to separate from his wife, Mrs. Reeves stated, quite parenthetically, that her husband had been staying at his cottage in Ewing for some time before August 1988. She also mentioned a "sit down" talk with her husband in which he emphasized that he had a right to have his sons with him as much as possible. His feelings on the subject were very strong. Anna Reeves testified that she did not disagree with him. The only way that petitioner could have his sons with him as much as possible was for them to live with him in Ewing during the school year. All winter he was not available on weekends. On days when the children had no school (vacations and weekends) they had to be supervised. Their mother's schedule of working on school days left her best able to put in custodial time on weekends and vacations.

Toward the end of school year 1988-89, it became obvious that the schedule the couple had set up was too difficult to maintain. It is noteworthy that Reeves then opted to go into business for himself regularly working daytime hours. The new business initially proved to be even more time consuming, but apparently was quite successful. Mrs. Reeves herself decided to rent a place in Ewing for 1989-90 school year and agreed that they would live together there. Had the Reeves been successful in finding a suitable property by October, the issues in this case might have been limited or a settlement might have been reached. Unfortunately they could not find a rental property in time. It is clear that having his children attend Ewing schools was not the motivating reason for petitioner's move to Ewing.

Like respondents in Bd. of Ed. of Mainland Regional High School District v. Peterson and Merlino, 1988 S.L.D. _____ C. Decision July 6, 1988, petitioner and his children could be said at least to have established temporary sleeping arrangements in the school district. The Reeves children spent more than 50 percent of school days and nights with their father in Ewing. I conclude that petitioner himself was domiciled in Ewing. He did live there and he intended to make Ewing his permanent abode although he intended to move to a different residence in Ewing by September 1989. Thus his true, fixed and permanent home and the establishment to which he intended to return was the cottage in Ewing. The description of domicile to which I refer is black letter law. Citizens Bankand Trust Co. v. Glaser, 70 N.J. 72 (1976). In re Dorrance 115 NJ Eg. 268 (1934).

The determination of domicile and residence of children for school law purposes under *N.J.S.A.* 18A:38-1 evolved in New Jersey away from the old precept that the domicile of the father is that of the children, V.R. on behalf of A.R. v. Hamburg Bd. of Ed., 2 *N.J.A.R.* 283, 286 (1980) aff'st Bd. 1981 S.L.D. 1533, rev'd on other grounds Rabinowi tz v. N.J. State Bd. of Ed., 550 F. Supp. 481 (DNJ 1982). When there is no formal separation agreement providing for sole custody, it is necessary to determine where the children spend the greater percentage of their time. The domicile of the father is not crucial to resolution of the issue. Gunthner v. Bd. of Ed. of Bay Head, 1978 S.L.D. 771, October 11, 1978. This case is closest to the point although petitioner Reeves' position herein is far more supportable than that of Gunthner.

I am somewhat concerned by inconsistencies between the conclusions in the above cited school law cases concerning the meaning of domicile in *N.J.S.A.* 18A:38-1 and the dissent of Judge Morgan in Bd. of Ed. of Little Egg Harbor v. Bds. of Ed., 145 N.J. Super. 1,12 (App. Div. 1975) because her reasoning was adopted by the Supreme Court at 71 N.J. 537 (1976) in reversing this case. Judge Morgan points out that *N.J.S.A.* 18A:1-1 defines "residence" to mean domicile "unless a temporary residence in indicated." She also notes that the domicile of a child is that of the natural father although it has occasionally been interpreted to mean "residence." The Little Egg Harbor case concerns a very unusual factual context: the court was attempting to find the domicile of a child where one with which the child had a real relationship was difficult to find since she resided at a private school. Additionally, the child had lived with both her natural parents before placement. Judge

Morgan's reasoning lends weight to my conclusion here, where actual presence of the children at their father's domicile may just barely exceed 50 percent of the time.

I **CONCLUDE** the Reeves' children are domiciled in Ewing because their father is domiciled there and because they spend over 50 percent of their school nights in Ewing unless exceptional circumstances preclude such residence, as did occur during several weeks of the relevant time period. Joint custody existed de facto, with the father having custody during school days and their mother having custody the rest of the time. Petitioner should remember that this decision only covers the period ending in October 1989, however. In the event the Reeves' have not rented a house in Ewing by the time of this decision, they shall take notice that the same issue may arise for the rest of 1989-90 school year. If they have not followed through on their intention to move to Ewing and the circumstances seen in this case continue, failure to keep a day-by-day log of nights spent in Ewing should raise a presumption against any allegation that the children spend over 50 percent of their school nights in Ewing. I **CONCLUDE** such presumption would be equitable precisely because a school district cannot be expected to maintain constant surveillance.

Sanctions of payments of attorney's fees and costs for failure to appear are authorized by *N.J.A.C.* 1:1-14.4(a)1ii.

It is therefore **ORDERED** that Donal Reeves pay the Board of Education of Ewing $232.50 in attorneys fees and costs and the Board's petition for tuition costs is **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

January 18, 1990
DATE

Naomi Dower LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

1/19/90
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 22 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

bc

D.R., ON BEHALF OF HIS MINOR CHILDREN, J.R., J.R., C.R., AND J.R.,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT.	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
PETITIONER,	:	
V.	:	
D.R.,	:	
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board of Education of the Township of Ewing, (hereinafter Board) filed timely exceptions pursuant to the applicable provisions of N.J.A.C 1:1-18.4.

The Board includes at the outset of its exceptions the following synopsis of its position:

> In spite of the evidence presented by the Board; and in spite of the fact that Mr. & Mrs. [R.] presented no evidence other than their own testimony; and in spite of the fact that petitioner was not, in light of the Board's proofs and his own demeanor, a credible witness; and despite the Judge's recognition of the strength of the Board's case, the ALJ decided that petitioner had carried the burden of proof and demonstrated that his children resided with him for a majority of school nights in Ewing Township. The Board submits that there is utterly no basis in the record for the ALJ's conclusion, and that upon the Commissioner's independent review of the record it will become clear that Initial Decision is replete with erroneous analysis and findings, totally lacking in discussion of competing evidence in order to arrive at supportable findings of fact and

> completely contrary to the weight of the credible evidence. (Board's Exceptions, at p. 3)

More specifically, the Board cites four exceptions to the decision of the ALJ. The first exception states:

> THE ALJ REACHED A CONCLUSION WHICH IS NOT SUPPORTED BY THE RECORD OR HER OWN REASONING.

The Board contends the only proof proffered by the parents in this matter has been their own testimony with no corroboration. It contends, on the other hand, that the Board took the appropriate steps necessary to verify residence, that is, it sent its attendance officers, one in the 1988-89 school year, another for the 1989-90 school year to make observations, more than 30 in all. It affixes a compendium of such surveillances in its exceptions, a document that was apparently culled from B-16 in evidence and from testimony of the two attendance officers. It claims that evidence corroborated by testimony from the school superintendent shows that the children were not residing in Ewing for a majority of school nights but, rather, that the four students in question departed and returned to the Trenton address where their mother resides on a majority of those days when surveillance took place.

In rebuttal to Mr. D.R.'s testimony that the attendance officers' observations were not presenting an accurate picture because they did not begin their surveillance until about 7:30 a.m., the Board offers the testimony of its witness from a private detective agency, hired to watch the Ewing residence during early morning hours, 13 additional observations which took place during May, June, September and October of 1989. It states:

> ***These [observations] took place during May, June, September and October, 1989. None of the observation dates fell on a Monday or Friday. On 12 of those 13 dates, the investigators observed no activity at the cottage. That is, no one was observed entering or existing (sic) from 4:30 a.m. to 8:30 a.m., not even petitioner.*** On ten of these twelve dates, the attendance officer made a simultaneous surveillance in Trenton. On 8 of these dates, all four children were observed leaving the Trenton residence with their mother.*** Additionally, there were 3 dates during these months on which the attendance officer made independent observations in Trenton. On all three dates the four children were observed leaving with their mother. All of the observations were admitted into the record uncontested.*** (Board's Exceptions, at p. 8)

Thus, the Board contends, its proofs demonstrate the merit of its position that the four children in question reside not in Ewing, but in Trenton. The Board argues that the ALJ's conclusion to the contrary could only be drawn

> by accepting every statement made by petitioner or his wife as absolute truth, by ignoring all inconsistencies in their testimony, by dismissing virtually every observation made by the Board based solely on the self-serving statements made by petitioner and, finally, by arriving at a conclusion which is not only unsupported by the record, but unsupported by her own reasoning.*** (Id., at pp. 9-10)

The Board avers that the ALJ's judgment was biased in favor of the parents before hearing the testimony. It supports this allegation by suggesting that although she felt the parents' testimony demonstrated unique circumstances, the testimony given pertaining to their exhaustive schedules did not support a finding that their lifestyle means that the children reside in Ewing.

> ***The point is, however, none of the detailed testimony of the [R.'s] hectic lifestyle lends any support to the claim that the children are residing in Ewing with their father. A hectic lifestyle would exist regardless of where the children resided, thus, "proving" such a lifestyle has no bearing on the case and leads to no conclusion which could justify ignoring the impact of the board's observations. Similarly, the fact that the testimony "came from both parents" is of no consequence, since there is still a total lack of proof with respect to the critical element in the case. And one could only shudder to think what Judge LaBastille could have meant by stating that "one of the parents is a teacher." If she means that teachers are somehow are more trustworthy than other people when testifying as a parent in support of a residency question, then the Board simply submits that there obviously is no basis in the record or in reality for such a finding. (Id., at p. 12)

Also on the point of corroboration of testimony, the Board notes that although the parents suggested that neighbors and relatives could substantiate their position, no other witnesses were called on the parents behalf. Summarizing its first exception, the Board submits the ALJ's finding of residence in Ewing Township was unsupported by the record, unsupported by her own analysis and should be reversed.

Exception Two states:

> THE ALJ'S FINDING THAT PETITIONER WAS A CREDIBLE WITNESS IS UNSUPPORTED BY FINDINGS IN HER DECISION AND IS INSUPPORTABLE ON THE RECORD.

In response to the ALJ's finding that D.R. was credible, the Board contends that in reviewing the ALJ's language from the initial decision at p. 3 explaining her rationale for finding him credible, she identified the following characteristics in D.R.'s testimony:

stubbornness,
shrewdness,
resistant to cross-examination,
short term memory deficit. (Id., at p. 15)

The Board submits that said characteristics are "at best neutral characteristics and at worst clear evidence of a lack of credibility, but under no circumstances would these characteristics lead a reasonable person to conclude that such a witness is 'very credible.'" (Id.)

The Board also proffers proposed findings of fact taken from its post-hearing submission in lieu of the ALJ's finding of credibility regarding D.R. It cites Tr. II-61-69 in support of its claim that D.R. was caught in a lie during cross-examination concerning his recollection of whether he had earlier testified that his children lived in Trenton when he first applied for their admittance to Ewing's school system. The Board claims he realized his inconsistency and sought to evade admitting it. The Board submits the Commissioner should find this example to be one demonstrating a lack of credibility on D.R.'s part. It also cites Tr. II-30-32 for another example of D.R.'s lack of credibility, this time related to whether it was unreasonable for D.R. to have been unable to estimate the number of days his wife dropped the children off at school. The Board finds the ALJ's basis for finding at page 4 of the initial decision that the parents' testimony was consistent and credible is not connected to the question of credibility at issue. It claims there is no evidence that Petitioner D.R. may have misunderstood the question, as the ALJ found but, rather, that he was unable to estimate the number of times that his wife dropped the children at school in Ewing. The Board claims that since he could estimate how many times his wife dropped the students at the bus stop, similarly, he should be able to estimate how many times she delivered the children to school. The Board finds equally unpersuasive the ALJ's further concluding that D.R. might not have been able to answer the latter inquiry because he was not home at the time. The Board maintains that the Commissioner should find that D.R. did demonstrate a "selective memory" (Board's Exceptions, at p. 20) and that this constitutes further evidence that he is an unreliable witness.

The Board also finds the testimony of D.R. concerning his brother Joe's residence unreliable. It cites Tr. II-54-58 in support of its position that here too, D.R.'s testimony was evasive. The Board finds it amazing that the ALJ found no inconsistency in D.R.'s testimony about where his brother Joe lived. "***She goes on in the same paragraph [of the initial decision at p. 4] to rehash petitioner's testimony in a way most favorable to petitioner and then concludes that the testimony is credible. Obviously, when one ignores inconsistencies in the testimony of a witness, it is not hard to find that witness to be credible." (Board's Exceptions, at p. 22)

Last in the matter of credibility, the Board raises concerns in exceptions about purported discrepancy in the enrollment forms for September 1988 and some of D.R.'s testimony regarding the

60-day grace period given him by the Board to establish residency with his children in Ewing.

The Board cites Tr. II-74 for the following position:

> Obviously, petitioner is not testifying as Judge LaBastille claims he did, i.e., that he only considered his kids to be residents of Ewing during the sixty day period, even though they lived elsewhere. In fact because of these fundamental inconsistencies there is absolutely no way in which to reconcile petitioner's testimony on this point. He simply lied. But, rather than acknowledge this credibility problem, Judge LaBastille fashions a rationalization and submits it as fact. The Judge is clearly in error and the Commissioner should correct this finding. (Board's Exceptions, at p. 23)

The Board also finds it inconsistent that petitioner first suggested on cross-examination that the Ewing cottage is home, while the Trenton house, which was fire and water damaged on the second and third floors was not, but then testified that his four children stay in Trenton every weekend. "***Obviously, it could not be both ways -- either the children were physically able to stay in Trenton or they were not.***" (Id., at p. 25) The Board faults the ALJ for failing to discuss these examples of inconsistencies in Petitioner D.R.'s testimony, and suggests that she should have agreed with the Board that it demonstrates less than truthful testimony on his part.

Further, the Board submits that Mrs. D.R.'s testimony suggests that Mr. D.R.'s motivation in moving to the cottage was not because of a marital separation but, rather, was to find the means of educating their children in Ewing rather than Trenton. It cites Tr. II-129-130 in support of this contention.

For the above reasons, the Board contends petitioner's testimony reveals him to be manipulative, evasive and inconsistent. It submits the Commissioner should find that petitioner lacks credibility and failed to carry his burden of proof in this case for his lack of candor and also for failure to corroborate his own story.

At Exception Three, the Board submits:

THE ALJ MADE NUMEROUS INCORRECT FINDINGS OF FACT.

To the ALJ's 35 numbered findings of fact the Board submits a fact-by-fact rebuttal, stating also that the ALJ improperly exercised the fact-finding function, citing "Admin. Law and Practice", Vol. 37, New Jersey Practice 1988, at 259-60 for its contention that the ALJ must analyze evidence and explain why one version is accepted while another version is not. This, the Board claims, the ALJ failed to do.

By way of summarizing the ALJ's findings of fact, the Board states:

> In summation, it is important to note that many of the AJL's findings deal only with the subjective intentions of petitioner (e.g. that he was protective of his sons; that he wanted them to live with him; that he wanted to get back with his wife; that he now wanted to find another place in Ewing to live with her; that he wanted to be able to spend more time with his children; that he wanted to "regularize" his work hours). These subjective intentions, however, in addition to being virtually impossible to verify, are of little value of deciding the key, objective factual issue in this case--namely, where did his children actually eat, sleep and reside during the period September 1988 to October 1989? And to that question, the objective observations point to one conclusion--the children resided with their mother in Trenton and she drove them to school or to the bus stop in Ewing on a majority of school days, if not every morning. Petitioner's story that the children slept in Ewing, but that he would get up at the crack of dawn, drive them to Trenton for breakfast, after which the mother drove them back to Ewing for school, is utterly preposterous and implausible, as well as directly contradicted by an overwhelming number of the observations.***
>
> (Board's Exceptions, at pp. 36-37)

The Board points out that while petitioner's motivation may have been well-intentioned, the law requires more than good intentions. It requires actual residence of the children in Ewing, the Board claims. The Commissioner should so find, the Board avers.

Finally, at Exception Four, the Board states:

> THE DISTRICT IS ENTITLED TO A JUDGMENT FOR TUITION COSTS FOR THE RELEVANT PERIOD.

In light of its arguments for reversal of the ALJ's decision, the Board seeks an award of tuition based on the district's tuition policy (B-7), the affidavit signed by petitioner (B-1), the attendance figures for each child (B-12, B-13, B-15) and the district's tuition costs (B-14) as well as the facts as it finds them.

Upon a careful and independent review of this matter, including a careful perusal of the transcripts of this matter, the Commissioner affirms the determination of the ALJ below that D.R's four children were domiciled in Ewing Township for the period in question, but for the reasons expressed below, not those of the ALJ.

The stature which governs the instant matter is N.J.S.A. 18A:38-1(a) which states:

> Public school shall be free to the following persons over five and under 20 years of age:
>
> (a) Any person who is domiciled within the school district***.

The issue in this matter is whether the four sons of D.R. and A.R. are domiciled in Ewing Township for the purpose of their attaining a free public education therein.

The record in this case establishes unequivocally that D.R., the father of the four children whose attendance in the Ewing school system is in question herein, owns a property in Ewing Township, for which he holds a deed. Neither is it seriously questioned that D.R. is domiciled in Ewing. (Tr. II-22) It is also admitted in the record of this matter that D.R. and his wife, A.R. are separated, at least at the time of the close of the record before the ALJ below. See, though, Tr. II-9-12,43, which discusses an impending reconciliation between the parents.

Traditionally, case law has held that a child's domicile is that of the father unless a marital fissure creates in the wife a right to a separate domicile. See P. v. Irvington Bd. of Ed., 1971 S.L.D. 180. The New Jersey Supreme Court has held that the question of domicile is one of fact, and that each case must be evaluated and determined by its own facts and circumstances, Lea v. Lea, 18 N.J. 1 (1955). The word domicile denotes one's home, the place to which one intends to return. See O'Hara v. Glaser, 60 N.J. 239, 248 (1972). Every person has a domicile at all times, and no person has more than one domicile at any one time. In re Gillmore's Estate, 101 N.J. Super. 77 (App. Div. 1968)

In the case entitled V.R., on behalf of A.R. v. Bd. of Ed. of the Borough of Hamburg, 1980 S.L.D. 1380, the Commissioner adopted the ALJ's consideration of exceptions to the general rule concerning the law that a child's domicile follows that of the father as follows:

> ***Changing times should, therefore, affect the domicile law only when the factual situation presented undercuts this rationale [i.e., child's domicile follows that of father as a result of child's dependence on father for support, maintenance, etc.] For example the rising recognition of women's independence is reflected in the Conflict of Law Restatement, Second Sec. 21 (1971) where a wife, under special circumstances, may have a different domicile from her husband, even if she is living with him.***
> (at 1383)

In the instant matter, the parents admit that they are separated. (Tr. II-13) Moreover, it is clear that the father supports his children, and that the mother agreed that the children

should reside with the father. (Tr. II-14,130) It is also evident from the record that the mother cooperated with the father's intention that the four boys live with him whenever he is not on an overnight trip with the bus company by whom he is employed. (Tr. II-130,137) Thus, notwithstanding the circumstances that have resulted in the children's sleeping in Trenton on various occasions, which dates were noted by the investigators called by the Board as witnesses, logic as well as basic fairness dictates that the children are in fact domiciled with their father in Ewing. This conclusion is made with the awareness that the parents are attempting to reconcile the marital rift between them. (Tr. II-9-12,47)

This is not an ordinary case where a school district seeks to demonstrate that the children and parents do not reside in the community but, instead, are attempting to gain access to the board in question from a place of domicile outside the district. In this case, there is no question that the father owns a home in Ewing and that it is his sole residence. Moreover, the record supports the conclusion that it is the clear choice of both parents that the custody of the children remain with their father in Ewing. In so concluding, the Commissioner finds the case law cited by the Board distinguishable from the instant circumstances.

At pages 16-17 of its brief, the Board cites Mainland Regional H.S. District Board of Education v. Peterson, decided by the Commissioner July 6, 1988; M.A.H. on behalf of L.H. v. Rutherford Board of Education, decided by the Commissioner October 20, 1987, aff'd St. Bd. March 2, 1988; V.R., on behalf of A.R. v. Hamburg Board of Education, 1980 S.L.D. 1380, aff'd St. Bd. 1981 S.L.D. 1533, rev'd Rabinowitz v. N.J. State Board of Educ., 550 F. Supp. 481 (D.N.J. 1982); Lakewood Bd. of Ed. v. Brick Board of Education et al., 1980 S.L.D. 1123, aff'd State Board 1981 S.L.D. 1444; and Richard Gunthner v. Board of Education of the Borough of Bay Head, 1978 S.L.D. 771. It relies on these cases for the proposition that because the petitioner's children do not reside with him a majority of the time, they are not entitled to be schooled in Ewing.

In the Mainland Regional v. Peterson case, supra, the mother of the child in question was claiming attendance for her son under the affidavit student section of N.J.S.A. 18A:38-1, that is, paragraph (b) or under N.J.S.A. 18A:38-1(d), the temporary resident section. The mother, whose marital status was not discussed in the matter, appeared to be the sole custodian of her son. She was adjudged by the Commissioner however, to have never been even so much as temporarily domiciled in the Mainland Regional District but, rather, was only temporarily residing therein. Under the instant facts, there is no question that D.R. is domiciled in Ewing and that both parents intend their four sons to live with him.

Similarly, in M.A.H., supra, the mother never established domicile in Rutherford, nor was she even temporarily residing in that community. Therefore, although the sole custodian of her daughter, the Commissioner held she was not entitled to a free public education in that school district.

Both V.R. on behalf of A.R., supra, and Lakewood Board v. Brick Board, supra, involved handicapped pupils whose parents had turned over custody of their children to foster parents in communities other than where they, the natural parents, lived. The issue in those two cases is readily distinguishable from this case because the pupils were placed in special education facilities, the cost for which was debated by the parties under laws other than N.J.S.A. 18A:38-1. No formal custody agreement has been drafted in the instant matter, and the record suggests that the parents are attempting to reunite in Ewing. (Tr. II-9-12,47) Accordingly, foster or custodial parent arguments are inapposite to this matter.

Finally, Gunthner, supra, is distinguishable from the instant matter because in that case the Commissioner ruled that the father's domicile was not at issue in the matter, in that the children's domicile was with their mother in Seaside Park, not in Bay Head, where the father spent 22 percent of his time. It bears emphasizing that in this case, the father is solely domiciled in Ewing, the home where he regularly returns and intends to remain. As such, no question may arise that if his children seek admittance to the Ewing Township schools, it is their right to do so because the domicile of the children follows that of the father, absent a factual situation undercutting this principle. The Commissioner finds no such extraordinary circumstances exist in this case that would call into question his domicile or the right of his children to attend school in the Ewing school district. See, by way of contrast, C.J. on behalf of her minor children, R.J. and D.J., Jr. v. Board of Education of the Borough of Palmyra, Burlington County, decided by the Commissioner May 14, 1986. In that case, as envisioned by the Restatement 2d, Conflict of Laws, the parents of R.J. and D.J. maintained two distinctly separate domiciles under circumstances where no marital separation had occurred. Clearly, those facts are distinguishable from the instant matter where separated parents agree to have the children permanently reside with their father, and also where there is evidence presented that the parents seeks to reconcile and reside together in Ewing.

Accordingly, for the reasons expressed above, not those of the ALJ below, the Commissioner adopts the conclusion of the Office of Administrative Law that D.R.'s children are domiciled in Ewing and, thus, are entitled to a free public education under the prescriptions of N.J.S.A. 18A:38-1.

COMMISSIONER OF EDUCATION

D.R., on behalf of his minor children, J.R., J.R., C.R., AND J.R.,	:	
PETITIONER-RESPONDENT,	:	
V.	:	
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
RESPONDENT-APPELLANT,	:	STATE BOARD OF EDUCATION
AND	:	DECISION
BOARD OF EDUCATION OF THE TOWNSHIP OF EWING, MERCER COUNTY,	:	
PETITIONER-APPELLANT,	:	
V.	:	
D.R.	:	
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 2, 1990

For the Petitioner-Respondent, Donal Reeves, pro se

For the Respondent-Appellant, Carroll & Weiss (Russell Weiss, Jr., Esq., of Counsel)

The decision of the Commissioner is affirmed substantially for the reasons expressed therein. We stress that our decision is based only upon that period of time at issue in the record before us. The Board's motion to supplement the record with information subsequent to that period is denied.

James Seabrook, Sr. opposed.
July 5, 1990

Pending N.J. Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4926-89
AGENCY DKT. NO. 200-6/89

IN THE MATTER OF
THE TENURE HEARING OF
ROBERT P. VALENTI,
SCHOOL DISTRICT OF THE
TOWNSHIP OF MONROE,
GLOUCESTER COUNTY

Mary L. Crangle, Esq., for petitioner (Tomar, Simonoff, Adourian & O'Brien, attorneys).
Walter L. Marshall, Jr., Esq., for respondent (Hannond, Caulfield, Marshall & McDonnell, attorneys).

Record Closed: December 6, 1989 Decided: January 19, 1990

BEFORE **EDGAR R. HOLMES, ALJ**:

On June 20, 1989, the Monroe Township Board of Education (Board) certified tenure charges against petitioner pursuant to the Tenure Employees Hearing Act. N.J.S.A. 18A:6-11. The Board determined that probable cause existed to credit the evidence in support of the charge that petitioner committed conduct unbecoming a member of the teaching profession because he was arrested and charged with possession of marijuana on March 11, 1989. The petitioner requested a hearing and

the matter was transmitted to the Office of Administrative Law to be heard as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A plenary hearing was conducted on November 6, 1989. The record was continued open until December 6, 1989, to permit the parties to brief the issue of penalty. No factual dispute appeared during the hearing.

The petitioner has been employed in the Monroe Township School District for twenty years. He teaches seventh and eighth graders. He has taught diverse subjects such as mathematics, social studies, science, reading and English. He has been a tennis coach, cross country coach and head basketball coach. He has been involved in intramural sports, adult basic education, and student council. He has been advisor to the school paper and the yearbook. He has served on the curriculum and discipline committees. He has participated in programs aimed at students, teachers, board members, administrators and parents, in this and in other school districts. He tutors. In 1989 he was nominated to be "teacher of the year." The nomination was withdrawn when he was arrested.

The arrest occurred at about 1:20 a.m. on March 11, 1989 in the parking lot of the Alpine Bar. Petitioner and a friend were preparing to smoke a marijuana cigarette in their vehicle in the parking lot when they were observed by policemen staked out in the lot who were on the lookout for drinking drivers. Petitioner and his companion, in addition to a hand rolled cigarette, possessed an additional 2.5 grams of marijuana. Possession of less than 50 grams of marijuana is a disorderly persons offense in New Jersey, not a crime, N.J.S.A. 2C:35-10.

After the arrest, the petitioner was granted a conditional discharge. He performed fifty hours of community service by working at the Gloucester County Library. His performance there was rated "excellent." He helped library staff complete inventory in a timely fashion.

John Muller is the Principal of an elementary school in Monroe Township. He has been employed in the Township school system for twenty-one years; the last nine years as a principal. He has known petitioner as a student, teacher and administrator. He supervised petitioner between 1976 and 1984. He opined that petitioner is an excellent teacher. He said petitioner followed the curriculum, was motivated and students respond well to him. He knows that petitioner is involved in

extra curricular activities at the school. When petitioner "volunteers" for something he "always comes through,"according to Muller. He said that other administrators share his views about petitioner and that teachers like him and work well with him.

Lewis Fiore has been a teacher in Monroe Township for fourteen years. He is both a colleague and friend of petitioner. He described petitioner as a "caring, excellent teacher." He said that petitioner does everything he is asked to do and then volunteers. He said that the school children miss petitioner and frequently ask about him.

Michael Cremo has been employed in the Monroe Township school system for twenty years. He is now a high school counselor. Prior to becoming a counselor, he taught seventh and eighth grade with petitioner. He too, is a friend and colleague of petitioner. He described petitioner as an excellent teacher, and effective. He said the "kids love him."

Dr. Robert Backer is the Superintendent of the Woodlyn School District. From 1973 to 1981, he was assistant superintendent in Monroe Township. He knew petitioner as a teacher. In his opinion, petitioner is a conscientious teacher; prepared, cooperative and willing to volunteer. He places petitioner in the top 5% of teachers. Dr. Backer knew of the incident. He did not think it would have a significant impact on the students at Monroe. "Fortunately," he said, "children forgive." Dr. Backer's testimony concluded the evidentiary phase of the hearing.

The Board proved and Valenti admitted that he possessed marijuana on March 11, 1989. I therefore **FIND** that Valenti possessed marijuana on March 11, 1989.

Does possession of marijuana constitute conduct unbecoming a member of the teaching profession?

Growing marijuana has been held to be conduct unbecoming a teacher. *In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph, Morris County* N.J.A.R. , 1980 (OAL DKT. NO. EDU 0429-80).

In the case of *Alfredo Arocha and Lazaro Gonzalez vs. the Board of Education of the Hudson County Area Vocational-Technical School District*, N.J.A.R. ,1985 the state's forfeiture statute was held to be applicable to tenured bus drivers/custodial employees convicted of drug offenses. N.J.S.A. 2C:51-2. The circumstances of possession however, were entirely different in that case. Gonzalez narrowly escaped imprisonment. Petitioner was never in danger of imprisonment. His offense was a disorderly persons offense and he was entitled to a conditional discharge because he had no previous record of drug abuse.

It is of course true that teachers "...are professional employees to whom the people have entrusted the care and custody of tens of thousands of school children with the hope that this trust will result in the maximum educational growth and development of each individual child. This heavy duty requires a degree of self restraint and controlled behavior rarely requisite to other types of employment." *In the Matter of the Tenure Hearing of Jacque L. Sammons School District of Black Horse Pike* Regional Camden County, 1972 S.L.D. 302, 321, N.J.A.R. .

This is why the offense committed by the petitioner is conduct unbecoming a member of the teaching profession. Possession of an illegal substance discredits the profession and violates the trust imposed upon teachers by the public. I therefore **CONCLUDE** that the petitioner committed conduct unbecoming a member of the teaching profession.

This single disorderly act, when viewed in the light of petitioner's exemplary record of 20 years, does not compel one to the conclusion that loss of tenure and termination is the only legitimate penalty. This offense was not committed on school property, involved no student, teacher or school administrator. There was no victim. The legislature does not view the smoking of marijuana as a particularly heinous offense. As recently as 1987 it increased the amount of marijuana a person could possess and still be deemed a disorderly person rather than a criminal.

Finally, I observe that there does not appear to be such an abundance of teachers who have the qualifications that petitioner has as would make his replacement a simple matter. As Dr. Backer indicated, petitioner is in the top 5% of teachers. His presence at Monroe should not be lost because of a single mistake. But

simply because petitioner is a valuable and well regarded teacher, his offense against his profession and the violation of the public trust should not be excused.

Accordingly, I **DIRECT** that petitioner be returned to his teaching postition, but that in recognition of the seriousness of the charge against him, he should forfeit 120 days' salary withheld from him by virtue of his suspension without pay. It is so **ORDERED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

1/19/90
DATE

Edgar R Holmes
EDGAR R. HOLMES, ALJ

Seymour Weiss
DATE

Receipt Acknowledged:

1/24/89
DEPARTMENT OF EDUCATION

JAN 24 1990
DATE

Mailed to Parties:

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

ldr

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT P. VALENTI,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWNSHIP	:	DECISION
OF MONROE, GLOUCESTER COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board filed timely exceptions pursuant to N.J.A.C. 1:1-18.4. Respondent filed timely reply exceptions thereto.

The Board concurs with the finding of the ALJ below that respondent's behavior on the evening in question constitutes conduct unbecoming a teaching staff member. However, strong exception is taken to the minimal penalty assessed by the ALJ. Citing, inter alia, In the Matter of the Tenure Hearing of Jeffrey Wolfe, School District of the Township of Randolph, 1980 S.L.D. 721, aff'd State Board 728, aff'd Superior Court (App. Div.) 1981 S.L.D. 1537, and Alfredo Arocha and Lazaro Gonzales v. Board of Education of the Hudson County Area Vocational-Technical School District, decided by the Commissioner August 16, 1984, State Board reversed April 3, 1985, the Board contends that serious punishment is warranted in this matter, and that everyone involved in this case has been made a victim of respondent's action in possessing a marijuana cigarette and 3.5 ounces of marijuana.

While the Board acknowledges its research revealed no case on point involving possession of marijuana under fifty grams by a teacher off school premises, it cites In the Matter of the Tenure Hearing of Lewis Glick, School District of the City of Elizabeth, decided by the Commissioner January 3, 1980, aff'd State Board April 4, 1980, aff'd Superior Court (App. Div.) December 15, 1980 and In the Matter of the Tenure Hearing of Donald Passero, School District of the Township of Edison, decided by the Commissioner October 17, 1983 as examples of cases where the Commissioner considered tenure charges against school employees for drug possession. In the former case, the Board notes that the controlled dangerous substance was cocaine, not marijuana, but that the Commissioner held that its use by a teaching staff member, even though not in school, constituted conduct unbecoming a teacher despite a conditional discharge in municipal court. It notes further that such offense was sufficient for the teacher's dismissal. The latter case involved a tenured night janitor, the Board observes, but in that matter the Commissioner found that even though the janitor had little contact with students, suspension without pay from January 7 through September 1 was appropriate. It submits that the forfeiture of 120 days' salary, as meted by the ALJ, is not an appropriate penalty and that such penalty must be reconsidered. The Board argues:

Similarly, respondent finds Arocha and Gonzales, supra, inapposite because the facts were different. He contends that Respondent Arocha was admitted to a pre-trial intervention program and granted a conditional discharge, which rendered the forfeiture statute, N.J.S.A. 2C:51-2, inapplicable to him.

Further, respondent argues that the Board does not disagree that he is an excellent teacher, but claims the Board ignores the "overwhelming record evidence" (Id., at p. 3) that he will continue to be a good role model to those students with whom he comes in contact. Respondent avers he "***made an isolated error in judgment, ***faced the reality of that error, accepted the consequences and [has] been able to overcome the issue and continue to make a valuable contribution to the teaching profession." (Id.) He claims that if he were dismissed, the message to students would be that one lapse or error in judgment, no matter how insignificant, is enough to deprive him of his livelihood and negate an exemplary 19-year teaching career. "***This hardly appears to be the type of message that a Board of Education would want to send to students who will be faced with adversity and who will make mistakes throughout their daily lives.***" (Id., at pp. 3-4)

Respondent contends while drug use cannot be condoned, it cannot be ignored that in this case there was no evidence of actual use, that it was clear that he was not the initiator, that it was an isolated instance and that there was no evidence educed that he has a drug problem. Respondent cites other Commissioner of Education cases dealing with the issue of an arrest and conviction for events which occurred outside of school and which reflected a single incident in an otherwise unblemished record by a dedicated teacher. He includes among them: In the Matter of the Tenure Hearing of Martin Lieb, School District of the Town of West Orange, Essex County, decided by the Commissioner July 1, 1985; In the Matter of the Tenure Hearing of Jude Martin, Township of Union Beach, Monmouth County, decided by the Commissioner September 2, 1987; In the Matter of the Tenure Hearing of Richard M. Pappa, School District of the Township Old Bridge, Middlesex County, decided by the Commissioner March 14, 1988; In the Matter of the Tenure Hearing of Greg W. Molinaro, School District of the Township of Parsippany-Troy Hills, Morris County, decided by the Commissioner June 26, 1989, and In the Matter of the Tenure Hearing of Richard Rumage, School District of the Township of Woodbridge, Middlesex County, decided by the Commissioner July 22, 1980.

In all the above cases, respondent claims, the Commissioner found that the matter did not touch upon or affect the respondent's ability to teach or interact with members of the school community. Respondent submits that these cases should guide the Commissioner in assessing a penalty for the unbecoming conduct established by his actions. He submits there is overwhelming evidence of mitigation including his lengthy years of service, his exemplary and unblemished record, his enthusiastic dedication to his job and the single isolated nature of the event. These circumstances, coupled with his contention that there is absence of evidence that he cannot serve as role model among those students with whom he comes in contact in the future, lead respondent to urge the Commissioner to adopt the ALJ's recommended penalty.

> Finally, as to the language of the penalty itself, it should be noted that the incident occurred on March 11, 1989 and that the Petitioner was suspended by the Superintendent, with pay, on March 13, 1989. His suspension was changed to one without pay, but with benefits on April 11, 1989, but the Certification proceedings were stayed at the request of the Petitioner on that date until the conclusion of the criminal proceedings against Mr. Valenti which occurred by an Order dated May 31, 1989.
>
> The charges were certified on June 20, 1989 and the one hundred and twenty (120) days during which a teacher may be suspended without pay ended on October 18, 1989, at which time Mr. Valenti was returned to the payroll, although his suspension continued. It should be noted that his benefits were never suspended.
>
> It is submitted that the penalty as set forth by Judge Holmes can have no meaning other than that Mr. Valenti should be reinstated without any payment of withheld wages. To read this phrase otherwise would be to force the Board of Education to pay Mr. Valenti for days he was suspended without pay due to his own request for a stay of proceedings. It is assumed that the language means he should be reinstated, without any back pay.
>
> While it is submitted by the Respondent Board of Education that the penalty set forth in the opinion of Judge Holmes is insufficient, if it is affirmed, a clarification in accordance with the Board's reading is requested.
>
> (Board's Exceptions, at pp. 6-7)

By way of reply exceptions, respondent contends the penalty imposed by the ALJ was not minimal, but rather was appropriate under all the circumstances and should not be disturbed.

Respondent avers the Board's reliance on Jeffrey Wolfe, supra, is misplaced because in Wolfe the employee was charged with a crime while Mr. Valenti was charged with a disorderly persons offense, which is not a crime.

> In Wolfe, supra, it appears that the employee incurred multiple criminal charges and the record is devoid of any mitigating circumstances. In the instant case, however, at issue is a single disorderly persons offense involving a minimal amount of a controlled dangerous substance (.3 grams) and overwhelming evidence of mitigating circumstances, uncontradicted by any Board evidence or testimony.
>
> (Reply Exceptions, at p. 2)

With respect to the issues raised by the Board as to the scope of the penalty, respondent states:

> ***We do not disagree that the certification proceedings in this case were stayed by the Board of Education at the request of Mr. Valenti until the conclusion of the criminal proceedings and that the charges were timely certified there~ after. Thus, there is no basis for Mr. Valenti to contend that he is owed back pay for this period. However, it should be noted that the net effect of the stay coupled with the 120 days withholding of salary has resulted in the forfeiture of not 120 days salary but rather approximately 180 days salary. Certainly, this is the antithesis of a "'minimal" penalty.
>
> (Reply Exceptions, at p. 7)

Upon a careful and independent review of the record before him, which, it is noted, does not include the transcript of the hearing below, the Commissioner adopts as his own the findings of fact and the conclusion of law that respondent in this matter is, indeed, guilty of conduct unbecoming a teaching staff member. He so finds for the same reasons stated by the ALJ in the initial decision, ante.

The Commissioner likewise notes that the Board of Education does not specifically except to the determination that respondent not be dismissed. The Board, however, requests a more stringent penalty. In this regard, the Commissioner finds himself in full accord with the position espoused by the Board, that the mere loss of 120 days' salary does not send a message sufficiently strong to respondent relative to the seriousness of his misconduct. Accordingly, the Commissioner determines that respondent shall forfeit salary not only for the 120 days denoted by the ALJ but also for the additional 60 days during which the time for restoration of salary was tolled, at respondent's request, pending the outcome of the criminal indictment. Moreover, lest respondent believe the Commissioner minimizes the importance of teaching staff members conducting themselves in such a manner as to be a model for the youngsters entrusted to them, he also imposes the penalty that respondent be retained for the 1990-91 school year at the salary level for training and experience that he enjoyed at the time of his suspension.

Consequently, the initial decision is adopted as modified herein.

IT IS SO ORDERED.

ACTING COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4588-89
AGENCY DKT. NO. 145-5/89

BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD,
Petitioner,
v.
THE BOROUGH COUNCIL OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,
Respondent.

Philip H. Shore, Esq., for the petitioner (Shore & Zahn, attorneys)

Ralph F. Stanzione, Esq., for the respondent

Record Closed: December 21, 1989 Decided: January 19, 1990

BEFORE **AUGUST E. THOMAS**, ALJ:

The Board of Education of the Borough of Spotswood (Board) appeals from an action taken by the Borough Council of the Borough of Spotswood (Council) under N.J.S.A. 18A:22-37 by which it certified to the Middlesex County Board of Taxation a lesser amount of appropriations for current expense purposes for the 1989-90 school year than the amount proposed by the Board in its budget which was rejected by the voters. After the matter was transferred to the Office of Administrative Law as a contested case (N.J.S.A. 52:14F-1 et seq.), a hearing was conducted on November 29, 1989, in the OAL, Trenton. The Board filed a posthearing brief on December 13, 1989 and a reply brief on December 21, 1989. The record was closed on December 21, 1989 after receipt of respondent's brief, and the "R" documents in evidence received on same date.

PROCEDURAL HISTORY

At the annual school election held on April 14, 1989, the Board submitted to the electorate a proposal to raise $3,725,407.00 by local taxation for current expense costs of the school district for the 1989-90 school year. The voters rejected the proposal. The Board then submitted its budget to Council for its determination of the amounts necessary for the operation of a thorough and efficient school district in Spotswood for the 1989-90 school year.

After consultation with the Board, Council made its determination and certified to the Middlesex County Board of Taxation the amount of $3,550,407.00 for 1989-90 current expense costs, a reduction of $175,000.00. The Board contends that Council's action was arbitrary, capricious and unreasonable and offered the testimony of its Superintendent and Business Administrator/Board Secretary in support of its need for restoration of the requested amount. Council denies that its action was arbitrary, capricious or unreasonable and maintains that its determination to raise a lesser amount by local taxation is fully consistent with its obligation under N.J.S.A. 18A:22-37.

At the beginning of the hearing, the Board offered an oral Motion to Dismiss Council's Answer because Council identified and itemized only $86,950 of the $175,000 reduction to its budget. The Board asserted that Council has an obligation, under the law, to identify all of its reductions, specifically its reductions concerning the Board's interest income and surplus.

MOTION TO DISMISS

Having reviewed the briefs submitted by the parties I **FIND** and **CONCLUDE** that the Board's Motion to Dismiss Council's Answer to its petition for failure to specify all of its proposed reductions, is **DENIED**. However, I concur with the Board's position that Council has an obligation to identify with specificity, all of the major accounts and line items in which it demands reductions. It is not enough for Council to tell the Board to take the remainder of the reductions from anticipated interest and/or surplus.

The facts show that Council reduced the Board's budget by $175,000 but identified only $86,950 by line item. At no point did it indicate from which line items

the $88,050 deduction should be taken and clearly argued that the Board's anticipated interest and surplus would be used so no specific deductions would actually be made concerning this sum.

N.J.A.C. 6:20-2.12 indirectly discusses the appropriate free balance to be maintained by a board of education. While there is no specific percentage of a current expense budget indicated as allowable surplus anywhere in the New Jersey statutes, evolving case law shows that a "reasonable" surplus cannot be depleted.

(a) A district board of education requesting to exceed the permissible rate of increase pursuant to N.J.S.A. 18A:7A-25 shall appropriate all available current expense free balance in excess of three percent of the current expense budget for the budget year such request is made.

(b) A district board of education, upon the advice of the chief school administrator, may request an exception, from the Commissioner, to the provision of (a) above.

(c) Any balance allowed pursuant to (a) or (b) above shall be exempt from the Commissioner's determination that a reallocation of resources is insufficient to meet the district board of education goals, objectives and standards. N.J.A.C. 6:20-2.12.

N.J.S.A. 18A:7A-25 governs school district budget increases. The Commissioner can approve a greater than otherwise permissible rate of increase if "a reallocation of resources or any other action taken within the permissible level of spending would be insufficient to meet the goals, objectives and standards established pursuant to this act. Nothing in this section shall prevent a board of education from appropriating additional amounts from miscellaneous revenues or free balances during the budget year." N.J.S.A. 18A:7A-25. The free balance or surplus held by a school board is meant to provide funds in case of emergency contingencies and is not to be used toward the funding of established categories of expenses in final budget approval.

The Superior Court, Appellate Division, affirmed the lower court's decision holding that "money required for its expenditures. . ." [means] that which the board projects it will have to spend, namely, an amount not reducible by deposit income or

surplus funds which may be in its possession or to its direct credit." Bd. of Ed. Fair Lawn v. Mayor, Council Fair Lawn, 143 N.J. Super. 259, 273, aff'd, 153 N.J. Super. 480. Fair Lawn involved the disbursement of funds by the municipality of an already approved budget. The municipality wanted the school board to use the surplus it invested during the year to pay for expenditures and to have the money refunded to it later. The issue was one of timing and who would lose the benefit of interest over the money in question.

> It is also clear that the board has the right, subject to ultimate review by the Commissioner of Education, to maintain a reasonable surplus in order to meet unforeseen contingencies. Patently, the whole purpose of the board's maintenance of a surplus would be defeated if it were required to be expensed for regularly budgeted and appropriated purposes. It is thus clear that surplus funds, not being legally available for regular budgeted expenses, could hardly be compelled by the municipality to be used to offset anticipated regular expenditures for purposes of the N.J.S.A. 54:4-75 requisition. Furthermore, since surplus funds are not usable until a proper contingency arises, the dictating financial practicality is for contingent funds to be invested until actually required. . ." Id. at 273-274.

The State Board of Education recently concurred "with the Commissioner that the free balance resulting from his decision provides the Board with a reasonable, but slender reserve, and we find that to permit the governing bodies to reduce that amount further would jeopardize the Board's ability to meet unforeseen expenditures. In so concluding, we reject the view that a governing body may fulfill its obligations to determine the amount necessary for each item in order to provide a thorough and efficient education by reducing those items on the grounds that such predictable budgeted expenses can be funded from free balance, or that the Commissioner's directive should be set aside on the basis of free balance that might exist at this point." Bd. of Ed. Delaware Valley Regional High School District v. Township Committee of Holland, 1989 SLD Feb. 6, 1989 at 9. The free balance in question constituted approximately 4% of the current expense budget. The State Board considered this a slender reserve, which was not to be depleted, but left untouched in order to meet unanticipated expenses.

The need for surplus funds has been approved by the Commissioner in numerous decisions. Recently, in affirming the Commissioner's decision in Bd. of Ed.

of Delaware Valley, supra, the State Board of Education paraphrased the Commissioner as follows:

> Having independently reviewed the record, the Commissioner concurred with the ALJ that no restoration was needed to the district's free balance, finding that the remaining amount constituting approximately 4% of the current expense budget provided a slender but reasonable reserve that would enable the district to meet unanticipated expenses for the remaining 2/3 of the school year.

In the instant matter, the record shows a current expense budget of $9,358,065 and a surplus of $327,921 (C-1; C-2) a 3 1/2% surplus. This surplus clearly falls within the guidelines as set forth by the Commissioner and approved by the courts.

N.J.S.A. 18A:22-37 requires that the governing body "determine the amount which, in the judgment of said body or bodies, is necessary to be appropriated, for each item appearing in such budget to provide a thorough and effective system of schools in the district." In the present matter and in Delaware Valley, the Council failed to meet this requirement. In this situation, the Council did not satisfy N.J.A.C. 6:24-7.5 which requires that in filing an answer, Council submit both "the amount certified for each of the major accounts [and the] line item budget stating recommended specific economics together with supporting reasons." N.J.A.C. 6:24-7.5(1) & (2).

This failure by Council in Delaware Valley was not held to be determinative since the substantive evaluation of the budget reductions was held to be the primary consideration of the Commissioner. "Accordingly, we hold that while the concomitant submission of reasons is a requirement in certifying a budget reduction, it should not be an absolute condition to the municipality's defense to a school board appeal." Board of Education of the Township of Deptford v. Mayor and Council of the Township of Deptford, 116 N.J. 305, 319 (1989). "At the same time, we want to stress that if the municipality fails to submit reasons contemporaneously with its certification of budget cuts, the Commissioner of Education in the course of an ensuing appeal is entitled to invoke a heavy presumption against the educational validity of the proposed budget cuts." Id. at 320.

The record shows that the Board's anticipated interest income falls far below the amount proposed by the Council. In any event, and based on the foregoing

discussion, Council failed to offer any specifics for a reduction of these funds even if the Board had generated a windfall on its investments.

Based on the above, I **FIND** that Council has failed to comply with the education laws in reducing the Board's budget by $88,050 in anticipated interest and surplus. I **CONCLUDE**, therefore, that $88,050 will be restored to the budget.

DISCUSSION

As the rules require, the Board submitted its written testimony defending its need for the economies effected by Council. As stated earlier, the current expense portion of the budget was reduced by $175,000. The Board reduced its budget as demanded; however, it did not reduce the specific line items recommended (except for account J-213); rather it reduced its budget utilizing other line items (P-1). In this regard, the Superintendent testified that the Board could better meet its obligation to the school district by making its own reductions to the current expense account. Further, the Superintendent testified that there were fixed and contractual obligations over which the Board had no control; therefore, it was compelled to make the adjustments it did even though many of the programs reduced would be adversely affected. For these reasons, he stated that the Board was unable to make the reductions specified by Council.

The Superintendent testified defending the Board's need for the items it actually reduced (P-1) and he was cross-examined by Council. The Superintendent's testimony was not refuted; however, in all fairness to Council, it had not seen this document prior to hearing.

In my judgment, the Board has the statutory authority to make adjustments within its current expense account (N.J.S.A. 18A:22-8.1). Therefore, this decision, for the greatest part, shall rest on the Board's defense of the specific line items reduced by Council. As a matter of fact, the very existence of P-1 leads me to draw an inference that the Board needed the monies cut by Council, with the exception of line item J-213, which will be discussed below.

In any event, each of the line items is here addressed for proper disposition.

LINE ITEM REDUCTIONS

LINE ITEM	DESCRIPTION	BOARD'S PROPOSAL	COUNCIL'S REDUCTION
110B	BD. SEC'S. OFC. SAL.	$165,095	$4,000
110F	SUP'T'S OFC. SAL.	147,029	4,200
120D	FEES-LABOR NEGOT'R.	33,000	8,000
130A	BD. MEMBER EXP.	20,425	5,000
130B	B. SEC. OFC. EXP.	16,400	7,000
130N	MISC.-STATE CONV.	8,050	3,000
213A	TCHR'S SALS.	2,755,856	20,000
214A	SAL. ACC'T.	67,717	1,000
214B	COUNS.' SALS.	145,343	2,500
214E	LDT/C SAL.	60,821	750
215A	SEC. SALS.	108,474	2,000
216A	LUNCH/ AIDES/MON'S .SALS.	33,907	1,000
410A	NURSES SALS.	107,631	2,500
510B	BUS DRVS. SAL.	19,058	500
630	HEAT	335,000	10,000
640	ELEC.	160,000	10,000
720A	MAINT. CONTR. COF./REF.	50,152	1,500
720B	CONTR. SVCS.-BLDG. ADMIN.	126,501	4,000
	TOTALS	**$4,360,459**	**$86,950**

LINE ITEM ECONOMIES

J-110B: Board Secretary's Office Salary;
J-214A: Salary Account;
J-214B: Counsellor Salary;
J-214E: Learning Disability Teacher Salary;
J-215A: Secretarial Salaries;
J-216A: Lunch Temps, Play Aides and Monitors Salary;
J-410A: Nurses Salaries;
J-510B: Bus Drivers' Salaries

Council's recommended economies in the above accounts are based on the Consumer Price Index which it contends is 4.5% in this part of New Jersey. Council contends that the Board's budget shows an average 9% increase in these accounts; whereas, a 6% to 7% increase is reasonable. The Business Administrator/Board Secretary testified that the average settlement in salaries for teachers, administrators and others in Middlesex County was 9% and it is anticipated that the Board's settlement with its staff would be about the same.

At the hearing, the Board presented a Memorandum of Agreement which was accepted as evidence (J-1). This Agreement shows that the Board and the Spotswood Education Association had agreed on a 9.6% increase for the teachers association for 1989-90. By letter dated December 11, 1989, the Board notified me that this Agreement would most likely be ratified in January 1990 and that both sides have affirmed the salary increase provisions.

Based on this testimony and the fact that all salaries are contractual obligations, I **FIND** that the Board has sustained its burden to prove why these salaries must be funded as budgeted. Therefore, the reductions in each of the above line items is restored.

J-110F: Superintendent's Office Salaries.

Council reduced this line item by 2% allowing a 7% increase. Its reasons are grounded on the Consumer Price Index and the retired assistant superintendent who will not be replaced. The Board argues that it needs a 9% increase to keep pace with

the average county settlement and that the Superintendent will have an increased work load by absorbing some of the duties of the former assistant.

From my review of this testimony, I **FIND** that the Board has not shown that this modest reduction, in light of the circumstances, will cause it to fail in its obligation to provide a thorough and efficient system of schools. The reduction is sustained.

J-213A: Teachers' Salaries.

Council cut $20,000 from this account reasoning that one teaching position at the first grade level should be eliminated. However, the record shows that there are 96 first grade pupils as of September 30, 1989, requiring at least four teachers, in ordinary circumstances. It appears that Council may have based its recommended economy on last year's first grade enrollment of 71. Additionally, the Board has hired an additional fourth grade teacher due to increased enrollments at this level. Nevertheless, the total staff has been reduced by 5 1/5 teachers, according to the Business Administrator's testimony; therefore, the reduction here is reasonable. It is noted that the Board made additional reductions in this item (P-1). The account is reduced, therefore, by $25,750.

J-120D: Fees-Labor Negotiator.

Last year was a negotiations year. Council reasoned that the amount in this account, though down from last year is still more than double that budgeted in 1987-88, a non-negotiating year. The Board testimony states that administrators' contracts expired on June 30, 1989 and that it was required to begin these negotiations in October 1989. Further, the teachers' contract negotiations continued into the 1989-90 school year. Additionally, other mandated services not required in prior school years are reflected in this account. Among them are: bond registrar, $2,000; Right to Know Law compliance, $3,500; Asbestos Hazard Emergency Response Act compliance, $10,000; chemical disposal, $2,000; and underground tank testing, $2,500.

Based on the foregoing, I **FIND** that the Board needs its budgeted funds for the reasons stated. This reduction is restored.

J-130A: Board Member Expenses.

Council states that an increase here is unrealistic considering the financial situation of the Borough. The Business Administrator testified that this account was erroneously "double budgeted" and it has been eliminated.

Accordingly, the increase is unnecessary and the reduction is sustained.

J-130B: Board Secretary Office Expense.

Council reduced this item by $7,000 reasoning that the computer program could be delayed another year without impairing the educational process. The Board asserts that it has a 5 year lease with IBM and it is committed to the full utilization of the equipment during the lease.

Based on the foregoing, I **CONCLUDE** that the monies are committed and necessary; therefore, the $7,000 reduction will be restored.

J-130N: Miscellaneous/State Convention.

The record shows that the Board has reduced this item for the past two years. In 1987-88 it was budgeted at $9,478; 1988-89, $8,225; and 1989-90, $8,050. Council offered no specific reason for the cut other than a consideration of the financial situation in the Borough of Spotswood. The Business Administrator testified that this expense was a contractual obligation of the Board.

Based on the record and this testimony I **CONCLUDE** that this expense is necessary and must be restored to the budget.

J-630: Heat; J-640: Electricity/Utility Account.

Both of these accounts were cut $10,000 each. The record shows a substantial increase over the amounts actually spent in 1987-88; but only a modest increase over the amounts budgeted for 1988-89.

Based on this record, I **CONCLUDE** that the modest reductions in these accounts must be sustained.

J-720A: Maintenance Contract Coffee Maker/Refrigerator.

The Board contends that no such contracts exist as alleged by Council. The Business Administrator testified that the Board is replacing old electric clocks with battery powered clocks as the old ones fail. The Board also proposed replacing the nurses' refrigerator.

In view of the defeated budget and resulting cuts by Council, I **CONCLUDE** that the Board has not shown that these items are necessary for the maintenance of a thorough and efficient system of schools; therefore, the cut will be sustained.

J-720B: Contracted Services for Building Administration.

As shown in account J-130B, the Board is in a lease agreement with IBM; therefore, no savings can be effected by postponing a new lease purchase agreement and maintaining the present system as Council suggests. $2,500 is restored.

Council asserts that a bond ordinance has passed for a new Memorial School roof; therefore, the $500 budgeted is not required. The Board's testimony shows that the roof replacement is scheduled for the summer of 1990 and that the $500 is required for repairs before the onset of winter. I am persuaded by the testimony that this is a necessary expense; therefore, it will be restored to the budget.

Council suggests that a new dumpster at a cost of $1,500 can be postponed for another year. Despite the Board protestations to the contrary, I agree with Council and will sustain this reduction.

Based on all of the above, a recapitulation of the line items follows:

LINE ITEM RESTORATIONS

LINE ITEM	DESCRIPTION	COUNCIL'S REDUCTION	RESTORED
110B	BD. SEC'S. OFC. SAL	$4,000	$4,000
110F	SUP'T'S OFC. SAL	4,200	-0-
120D	FEES-LABOR NEGOT'R.	8,000	8,000
130A	BD. MEMBER EXP.	5,000	-0-
130B	BD. SEC. OFC. EXP.	7,000	7,000
130N	MISC.-STATE CONV.	3,000	3,000
213A	TCHR'S SALS.	20,000	-0-*
214A	SAL. ACCT.	1,000	1,000
214B	COUNS.' SALS.	2,500	2,500
214E	LDT/C SAL.	750	750
215A	SEC. SALS.	2,000	2,000
216A	LUNCH/PLAY AIDES/MON.	1,000	1,000
410A	NURSES SALS.	2,500	2,500
510B	BUS DVS. SAL.	500	500
630	HEAT	10,000	-0-
640	ELEC.	10,000	-0-
720A	MAINT. CONTR. COF./REF.	1,500	-0-
720B	CONTR. SVCS.-BLDG. ADMIN.	4,000**	3,000
	TOTALS	**$86,950**	**$35,250**

* Actual reduction by the Board was $25,750 (See P-1)

** Council's specific recommended economy totaled $4,500.

The line item restorations of $32,250, added to the $88,050 restored earlier, totals $120,300. Based on the persuasive testimony and that such testimony establishes by a preponderance of the credible evidence as set forth above, I **FIND** and **CONCLUDE** that the sum of $120,300 must be restored to the Board's budget so that it may provide for a thorough and efficient system of schools in the Borough of Spotswood.

Accordingly, it is **ORDERED** that $120,300 be added to the tax levy of the Borough of Spotswood by the Middlesex County Board of Taxation so that the total amount certified to be raised by local taxation for current expense costs of the Spotswood Board of Education for the 1989-90 school year shall be $3,670,707.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10(c).

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

19 January 90
DATE

August E. Thomas
AUGUST E. THOMAS, ALJ, T/A

Agency Receipt:

1/22/90
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 24 1990
DATE

Jayne LaVerdiere
OFFICE OF ADMINISTRATIVE LAW

tp

BOARD OF EDUCATION OF THE BOROUGH OF SPOTSWOOD,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
THE BOROUGH COUNCIL OF THE BOROUGH OF SPOTSWOOD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The parties' exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

The Board excepts to the ALJ's decision insofar as there was a transposition error in the amount ordered to be restored when the restored line item total of $35,250 on page 12 of the initial decision was carried forward on page 13 as only $32,250. The Council does not take exception to this error. Moreover, review of the figures does indicate an error was made. Thus, the record is corrected to reflect a $123,300 restoration ordered by the ALJ.

The Board next excepts to the ALJ's conclusions with respect to J-130A: Board Member Expenses, averring the ALJ misinterpreted the Board Business Administrator's testimony about the double-budgeting of $2,000 for this account. According to the Board's exceptions the error was eliminated when the budget was refined; thus, the account was accurate when the Spotswood citizens voted on the budget. The Council does not except to the Board's position as to this account. Therefore, the record is corrected to reflect that the double-budgeting of $2,000 was adjusted prior to voter action on the budget.

A review of the record and the Board's exceptions fails to provide sufficient information to the Commissioner to conclude that the Council's $5,000 reduction in Line Item 130A was arbitrary and that said sum is necessary for a thorough and efficient educational program in the Spotswood School District. However, insofar as the ALJ misperceived that $2,000 of that account represented a double-budgeting error, $2,000 is restored to account 130A.

The Board further excepts to the ALJ's conclusions with respect to line item J-213A: Teachers' Salaries, averring that here too the ALJ misinterpreted the evidence submitted. As to this, the Board argues that not only must the $20,000 reduction made by the Council be restored but also that another $30,000 in shortfall in that account be made up by ordering the restoration of other line item reductions made by the Council. Such restoration is necessary according to the Board because after the Council reduced the budget by $175,000, the Board reduced the Teachers' Salaries account by $25,750 (vs. $20,000 recommended by the Council) as it anticipated

restoration of that account. Moreover, whereas the budget was arrived at on the assumption of a 9% increase in salaries, the salary negotiations with teachers resulted in a 9.6% increase which brought the amount necessary to meet teachers' salaries to $50,000 over the budgeted amount.

As such, the Board urges that the full amount of reduction by the Council be restored.

The Council urges that the Board's reasoning is flawed with respect to account 213A: Teachers' Salaries, avowing that the Board is seeking full restoration of the $20,000 and more, due to the fact that it negotiated a higher than anticipated percentage raise to teachers. Council maintains that the Board had control regarding that contract and should not have anticipated the line item would be restored. Council further urges that a properly prepared budget must be prepared as if it would not be restored. Council also avers that the Board Secretary testified that any shortfall in the Teachers' Salaries account would be satisfied from the surplus account.

Council also argues that:

> Lastly, the Petitioner uniformly, without further reasoning, requests that all reductions be restored as it needs the funds due to the salary increase. It must be clearly noted that the Petitioner has a more than adequate surplus account and that the surplus account is to be utilized for unforeseen expenses such as the salary increase. In fact, the Petitioner should have foreseen and controlled the expense instead of providing an increase in excess of 9.5% for each of the next two years during a year in which the public defeated its school budget.
>
> Therefore, the Commissioner should uphold the reduction in the 213A account as recommended by the Court. (Council's Reply Exceptions, at p. 3)

The Council in its primary exceptions to the initial decision objects to the ALJ's restoration of the $88,050 reduction to the surplus. It argues that the ALJ unreasonably permitted the Board to include future debts in order to appear to reduce the surplus account. More specifically, the Council alleges that the surplus account stood at $327,921 or 4% of the current operation budget of $9,358,065, but then an additional $98,911 was erroneously deducted from the surplus in order to set monies aside due in the 1990-91 budget year to the Borough of Milltown and Helmetta. According to the Council, it was improper to displace said monies from the surplus account in the disputed budget herein as that sum was not an expenditure for the 1989-90 school year. Council goes on to argue that if the sum of $98,911 were added to the surplus account, there would be approximately a 5% surplus account which would exceed the current 3-3.5% surplus deemed reasonable for a board of education. (Council's Primary Exceptions, at p. 2)

Council also urges that the Commissioner should sustain the reduction of $7,000 from the 130B account and $2,500 from the 720B account, averring that there was no testimony provided by the Board which demonstrated that the one-year postponement the Council recommended would adversely affect the thorough and efficient education. Council decries the fact that notwithstanding its recommendation to the Board to delay acquisition of a computer system, the Board went forward with its lease/purchase and incurred additional costs. (Id.)

The Commissioner has conducted an independent review of the record in this matter and concurs with the ALJ's recommended decision except as noted herein with respect to the undisputed error in calculation of the total reduction being effectuated, $123,300 v. $120,300 and the undisputed misinterpretation about the double-budgeting of a $2,000 amount in the 130A account for Board Member Expenses. The ALJ's conclusion relative to restoration of the $88,050 reduced by Council in anticipated interest and surplus is supported by the record, particularly in light of the increased amount of teachers' salaries not budgeted for by the Board. However, the Commissioner soundly rejects the Board's argument that total restoration of all reductions by the Council should be ordered due to the negotiation of a contract for teachers' salaries after the budget defeat which was in excess of the amount projected during budget preparation. It is for just such exigencies that a surplus is maintained. The surplus restoration already ordered herein should more than amply permit the Board to meet its salary requirements not anticipated at the time of budget preparation and adoption.

Further, the Commissioner finds meritless the Council's argument that $7,000 in the 130B account and $2,500 from the 720B account should not be restored because the Board should have postponed for one year acquisition of a computer system. As pointed out by the Board in its reply and the ALJ, the lease with IBM represents funds already committed, and, according to the Board, the lease actually commenced during the 1988-89 school year.

Accordingly, it is ordered that $125,300 be restored to the budget and tax levy for the 1989-90 school year for the Borough of Spotswood School District. Consequently, the total amount certified to the Middlesex County Board of Taxation to be raised by local taxation for current expense costs shall be $3,675,707 as reflected below:

	Current Expense
Original Tax Levy	$3,725,407
Reduction	175,000
Tax Levy After Reduction	3,550,407
Restoration by Commissioner	125,300
Tax Levy After Restoration	$3,675,707

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6890-89
AGENCY DKT. NO. 286-9/88
ON REMAND FROM
OAL DKT. NO. EDU 7218-88
AGENCY DKT. NO. 286-9/88

MIDDLETOWN TOWNSHIP BOARD OF EDUCATION,
Petitioner,
v.
ROBERT LEO,
Respondent.

Howard M. Newman, Esq., for petitioner (Kalac, Newman & Lavender, attorneys)

Mark J. Blunda, Esq., for respondent (Oxfeld, Cohen, Blunda, Friedman, LeVine & Brooks, attorneys)

Record Closed: December 11, 1989 Decided: January 23, 1990

BEFORE **DANIEL B. MC KEOWN**, ALJ:

INTRODUCTION

This matter is on remand from the Commissioner of Education by way of his Order dated September 13, 1989 and transferred to the Office of Administrative Law on September 14, 1989 as a contested case under N.J.S.A. 52:14-F1 et seq.

PROCEDURAL HISTORY

On September 6, 1988 the Middletown Townhsip Board of Education (Board) certified to the Commissioner of Education for determination under the Tenure Employees Hearing Law, N.J.S.A. 18A:6-10 et seq., charges of incapacity, insubordination and unbecoming conduct against Robert Leo (respondent) a teacher with a tenure status in its employ. The Board had suspended respondent from his teaching duties but elected to continue his salary which continues during the suspension. After the Commissioner transferred the matter to the Office of Administrative Law as a contested case, six days of actual hearings were conducted in the matter.

On July 31, 1989 this judge issued an initial decision in which findings were reached that each of the nine charges filed against respondent were proven true by a preponderance of credible evidence. Conclusions were reached that the findings established respondent was incapacitated, that he engaged in conduct unbecoming a teacher, and that he was insubordinate. This judge recommended that respondent's employment as a teacher with the Board be terminated on the following basis:

> In this case, there are numerous incidents shown to have occurred during 1987-88 which reflect respondent's incapacity, unbecoming conduct, and insubordinate conduct which demonstrate his unfitness to hold the post of teacher. Those incidents include his refusal to communicate with parents, his refusal to send injured pupils to the nurses, his tolerance of pupils expressing vulgarities to him, throwing rocks at him, degrading him by rubbing his stomach and messing his hair, becoming involved in an altercation with a pupil and ignoring all misbehavior that went on about him. Respondent's insubordinate conduct with respect to the Board's directive to him to secure a physical examination is another manifestation of the attitude respondent adopted during 1987-88, voluntarily or otherwise, which shows his incapacity and unbecoming conduct.
>
> Initial Decision, at p.36

The Initial Decision was forwarded to the Commissioner for his review. The Commissioner agreed that each and every charge against respondent was proven true in fact. Nevertheless, the Commissioner then ruled as follows:

> *** Given the nature of respondent's problems during 1987-88, it is abundantly clear that more than a routine physical, especially one conducted by a physician with no apparent knowledge of the Board's reason for requesting the exams [it is noted that there is

> no evidence that any physician at the time conducted any examination of respondent because respondent refused to attend an examination as directed by the Board], is needed to determine whether or not respondent's incapacity is medical in origin and susceptible to cure. Indeed, respondent's very handling of the Board's request appears to be more an extension of the obvious malaise underlying his recent conduct than an act of conscious insubordination.
>
> Accordingly, even though the charges as framed by the Board have been showing to be true, the Commissioner determines to take no action to dismiss a teacher of 25 years' service based on one inexplicable year of incapacitation, without a clear finding as to whether the collective events of that year were an unfortunate but short-term aberration or an indication of permanent unfitness to teach, and without a finding as to whether respondent's incapacity was (or is) the result of an as yet unidentified medical problem, physical or mental. Rather than set aside the charges without prejudice pending the Board's ordering of the necessary exams, however, the Commissioner prefers to order the exams himself [citation omitted] thus, obviating the necessity for statement and appeal procedures which, in view of the present proceedings, would only be repatitive in substance and outcome. Further, such a dismissal could return repondent to the classroom before a determination has been made that he is able to function in his present state.
>
> The Commissioner therefore remands this matter to the Office of Administrative Law for a determination of the origin and extent of respondent's incapacity. He further directs Robert Leo to submit to complete physical and psychiatric examinations by a physician or physicians designated by the Board (or of his own choosing with the approval of the Board), the results of which are to made part of the record herein.***

The Board immediately filed a motion for clarification of the Commissioner's decision and a separate motion for interim declaratory relief regarding the continuation of respondent's salary. The Commissioner of Education denied both motions. (PR-1) (PR-2). The Board then filed a motion for leave to appeal before the State Board of Education which was also denied. (PR-3) (PR-4).

REMAND

Pursuant to the Commissioner's remand, respondent was administered a physical examination by a Richard Commentucci, M.D. on September 27, 1989. Dr. Commentucci submitted a written report (PR-5) to the parties of that examination of October 17, 1989. In this report, brief as it is, Dr. Commentucci did not find "*** any acute medical problems with [respondent]." The Board requested of Dr. Commentucci a

more in depth report which he supplied the parties on October 25, 1989 (PR-6). This report also concluded that "no acute medical problems were found [with respondent]". Pursuant to the Commissioner's remand, respondent was administered a psychiatric evaluation on October 5, 1989 by John P. Motley, M.D., who is a Diplomate of the American Board of Psychiatry and Neurology. Dr. Motley forward a report (PR-7) dated October 6, 1989 to counsel for the Board who in turn provided a copy to counsel for the respondent.

A hearing on remand was conducted December 8, 1989 at the Monmouth County Hall of Records, Freehold. Findings are reached in this Initial Decision on remand that respondent suffers from a delusional disorder which has no organic basis but which renders respondent completely disabled from performing his duties as a teacher in the Middletown Township Public Schools.

EVIDENCE ADDUCED AT REMAND HEARING

Prior to a recitation of the evidence adduced at the hearing, it is noted that the Board strenuously objects to the remand proceedings, particularly that portion of the Commissioner's Order regarding a determination of the "origin and extent of respondent's incapacity." Moreover, the Board strenuously objects to it being obligated to continue respondent's salary under the Order of Remand in light of the fact it proved each and every tenure charge it filed against repondent. The Board is of the view that it is being dealt with unfairly by having gone through the costly proceeding of a tenure case, having proved its charges, only to have the proceeding extended by the Commissioner in order to inquire into an issue raised only by the Commissioner himself. The Board complains that the cost of not only continuing repondent's salary, but of the attendant legal costs of continuing this proceeding, is improperly being borne by Middletown Township taxpayers.

In regard to the evidence adduced at hearing, both medical evaluations are in evidence. The sum and substance of Dr. Commentucci's physical examination of respondent has already been reported wherein Dr. Commentucci finds repondent suffers from no acute medical problems. Dr. Commentucci did not appear at hearing.

Manual, because delusions are the primary symptom of delusional disorder and the term 'paranoid' has multiple other meanings which can cause confusion, the revised third edition uses term delusional disorder. The Manual defines delusional disorder as the "*** presence of a presistent, non-bizarre delusion that is not due to any other mental disorder shich as Schizophrenia, Schizophreniform Disorder, or a Mood Disorder. The diagnosis is made only when it cannot be established that an organic factor initiated and maintained the disturbance." Id.

Dr. Motley testified that the origin of the disorder is a complex issue which, functionally, is associated with biochemical changes in the brain. Dr. Motley opined that while a neurological examination, along with a CAT scan, may assist in identifying the origin, no guarantees exist that the origin of such a disorder could ever be isolated. While Dr. Motley testified that he cannot state with any reasonable degree of medical certainty those factors which contribiuted to the impairment, certain factors may be speculated upon. Dr. Motley is of the opinion that respondent feels slighted and mistreated by school authorities, collegues, and pupils. Dr. Motley speculates that perhaps such feelings by respondent stemmed from his not being reappointed as department chair of physical education or because of the class change, or respondent's negative performance evaluations, or some blow to respondent's ego, or the realization at his age, which is about 50, that he is a mortal being. Dr. Motley acknowledges that he cannot unequivocally state that any or all factors contributed to respondent's disorder because respondent was vague and very guarded in his responses to questions posed during the examination. Nevertheless, the very fact respondent was evasive and non-responsive to his questions is symptomatic of a delusional disorder. In Dr. Motley's opinion, respondent's delusional disorder impairment is focused on the occupational, or teaching, sphere as opposed to a more personal focus. Dr. Motley testified that in his opinion respondent's transfer to another school within the district would not alleviate respondent's disorder because the most difficult hurdle to treat delusional disorder is to convince the patient he has the illness and pursuade him to at least be willing to try work at trying to solve the disorder. The prognosis to assist respondent through his delusional disorder is, according to Dr. Motley, very poor because of respondent's refusal to recognize reality which conclusion is based on the two hour session with respondent.

Dr. Motley testified that respondent's delusional disorder is not organic in nature because respondent does not suffer from bizarre delusion. Furthermore, Dr. Motley explains that a organic delusional syndrom results from metabolic or toxic changes induced by, as examples, alcohol or drugs neither of which is present here.

FINDINGS OF FACT

The testimony of Dr. Motley, the sole witness called to testified in the hearing on remand, and his written report of examination administered respondent, I find to be trustworthy and credible. Therefore, based on the evidence adduced at the hearing on remand order of the Commissioner of Education, I **FIND**, the following facts to exist:

1. Physcially, respondent does not suffer from any acute medical problems.

2. Psychiatrically, respondent suffers from delusional disorder which, functionally, is associated with biochemical changes in the brain.

3. It is difficult, if not impossible, to isolate factors which contribute to a delusional disorder.

4. In respondent's case, the task of isolating factors which contribute to his present delusional disorder is made impossible for Dr. Motley by respondent's vaugeness and non-responsiveness to Dr. Motley's legitimate questions posed him during the examination. The "origin" of respondent's delusional disorder cannot be established. Nevertheless, it is established that respondent does not suffer from an organic delusion disorder, or disorder resulting from toxic or metabolic changes caused by alcohol or drugs.

5. Respondent's present impairment or incapacity, delusional disorder, renders him "*** completely disabled from the teaching profession by the nature of his condition."

6. The prognosis for respondent's recovery from his impairment is very poor in that respondent refuses to recognize his impairment.

7. Finally, the Board's argument regarding the asserted inequity of being obligated to continue respondent's salary for this remand proceeding when the Commissioner agreed on September 13, 1989 it proved the charges against respondent which charges would otherwise warrant termination of any tenured teacher, is referred directly to the Commmissioner for his consideration.

CONCLUSIONS

I CONCLUDE, pursuant to the Commissioner's request, that respondent's physical condition as assessed by Dr. Commentucci is not relevant to the unbecoming conduct, conduct manifesting incapacity, and insubordinate conduct in which respondent

engaged during 1987-88 as proved by the Board in the earlier tenure proceeding. I **FURTHER CONCLUDE** that psychiatrically respondent is impaired by the illness delusional disorder. The "origin" of respondent's present impairment cannot be isolated or identified with any reasonable degree of medical certainty. The "extent" of respondent's incapacity renders him incapable of performing his duties as a teacher. The prognosis for respondent's recovery from his impairment is poor in light of the fact that respondent refuses to recognize the existence of his impairment which refusal is a symptom of the impairment itself.

In sum, and pursuant to the Commissioner's request, the origin of respondent's impairment is unknown. The extent of respondent's impairment renders him incapable now and in the foreseeable future of performing duties as a teacher.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

January 23, 1990
DATE

DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged: Seymour Weiss

1/24/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 26 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

tmp

IN THE MATTER OF THE TENURE	:	
HEARING OF ROBERT LEO, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE TOWNSHIP OF	:	DECISION ON REMAND
MIDDLETOWN, MONMOUTH COUNTY.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by respondent and replies by the Board were timely filed.

In his exceptions, respondent argues that, contrary to the ALJ's conclusion that the "origin" of his impairment is unknown (Initial Decision, at p. 9), the present proceedings before OAL have clearly established a psychiatric disorder as the cause of respondent's incapacity. He should, therefore, be permitted to utilize his accumulated sick leave for treatment and recovery pursuant to N.J.S.A. 18A:16-4.

In reply, while concurring that the presence of a psychiatric disorder was in fact established, the Board argues that the sick leave statute invoked by respondent presumes an illness reasonably susceptible to cure. Respondent's prognosis, in contrast, has been judged poor by both the examining psychiatrist and the ALJ, and respondent himself indicated neither an intention to undergo treatment nor an acceptance of his diagnosis. Instead, "***[h]e simply and unabashedly desires the benefit of his accumulated sick leave, which to current date is 249½ days.***" (Reply Exceptions, at p. 2)

Such benefit would be counter to the public interest, the Board argues. However, should the Commissioner determine to grant it, fairness dictates that the following conditions should apply: calculation of both sick day entitlement and the two-year maximum leave period should commence upon the date of respondent's suspension (September 6, 1988), since, if he was not ill at that time, there would be no basis to sustain his employment in view of the charges proven against him; and, further, the Commissioner should retain jurisdiction so that, if respondent fails to offer adequate proof of recovery upon expiration of leave, his tenure can be automatically severed at that time. The Board concludes by noting that it "cannot continue to be responsible for the salary and benefits of Mr. Leo ad infinitum. The costs of this litigation, including the medical and psychiatric examinations, coupled with the full payment of Mr. Leo's salary and associated health benefits are simply staggering and some equitable relief must be allowed." (Id., at p. 4)

With the record before him now amplified by the instant remand proceedings, the Commissioner is satisfied that respondent's employment with the Board should be terminated despite his 25-year record of satisfactory teaching service to the district. That

record earned for respondent the opportunity to demonstrate that his unusual behavior during the one-year period in question was due to an undiagnosed physical or mental condition for which, given an opportunity, he could obtain treatment and a probable cure sufficient to return to his teaching duties. The present record, however, leaves little doubt that this option would not be appropriate in respondent's case. Clearly, the psychiatric disorder from which he has been found to be suffering is both disabling for purposes of performing his teaching duties and likely to be a long-term condition, if susceptible to cure at all. Under these circumstances, the Commissioner can neither permit respondent to return to the classroom nor oblige the district to grant extended sick leave in view of the almost certain prospect that his recovery would be insufficient upon expiration of the permissible leave period.

The Commissioner acknowledges the Board "strenuously objects" to the remand proceeding ordered by him. (Initial Decision, at p. 4) However, he notes that, had the Board explicitly ordered, and followed the necessary procedures for, the psychiatric examination that was clearly warranted by respondent's deviant behavior at the outset of its recognition of his problem, the instant matter could have been resolved much more quickly and at far less cost to the Board. Had respondent contested such an order, the Board had ample basis to prevail before the Commissioner in justifying its request. Presuming that the outcome of the exam would have been as it was in these proceedings, respondent's removal from the classroom could have been achieved by invoking a prohibition against continued service pending recovery under N.J.S.A. 18A:16-1 (where the cost of any absence could, at the Board's discretion, have accrued to respondent rather than the district) or ordering a disability retirement under N.J.S.A. 18A:66-39. Had the Board still deemed tenure charges necessary, it could have filed based solely on demonstrated medical incapacitation, with the result that filings and proceedings alike would have been much less complex and protracted, with success on the merits very likely. By choosing to proceed as it did, the Board offered no firm basis on which the Commissioner could conclude that respondent's suddenly aberrant behavior was not due to a temporary condition susceptible to reasonable efforts at correction, such that termination from a position held creditably for 25 years and protected by the full force of the tenure laws would be justified.

As a result of the instant proceedings, however, a clear conclusion can now be reached. The Commissioner affirms the ALJ's finding that, due to a delusional disorder with a poor prognosis for recovery, Robert Leo is incapable now and in the foreseeable future of performing his duties as a teacher. Accordingly, the employment of Robert Leo as a tenured teacher in the Middletown Township School District shall be and is hereby terminated, effective as of the date of this decision. Further, this matter shall be forwarded to the State Board of Examiners for its consideration pursuant to N.J.A.C. 6:11-3.7(b)1i.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3307-89
AGENCY DKT. NO. 339-10/88

ANGELO BRACOLONI,
Petitioner,
v.
THE BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,
Respondent.

Scott A. Krasny, Esq., on behalf of petitioner (Albert, Schragger, Lavine, Levy & Segal, attorneys)

Mark F. Kluger, Esq., on behalf of respondent (Clapp & Eisenberg, attorneys)

Record Closed: September 6, 1989 Decided: February 5, 1990

BEFORE **RICHARD J. MURPHY,** ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Angelo Bracoloni, a teacher employed by the respondent Board of Education of the Princeton Regional School District, seeks compensation from the Commissioner of the Department of Education for sick leave injury payments under *N.J.S.A.* 18A:30-2.1, for July and August of 1988, in connection with an injury stemming from a falling plant that the petitioner alleges occurred on the job. Respondent Board, which had denied the claim for sick leave injury, now moves to dismiss for lack of jurisdiction. For the reasons set forth below, that motion is granted.

On May 3, 1989, this matter was transmitted by the Department of Education to the Office of Administrative Law for a hearing as a contested case, pursuant to *N.J.S.A.* 52:14F-1 *et seq.* The Department also transmitted the respondent's motion to dismiss the appeal for the lack of jurisdiction. The matter was initially scheduled before the Honorable Daniel B. McKeown on July 18, 1989, but adjourned due to court conflict by petitioner's attorney and that matter was scheduled before me on August 8, 1989, at which time it was determined that petitioner's motion should be decided before any further proceedings were conducted. The record remained open until September 6, 1989, for the filing of supplemental pleadings in connection with that motion, and the petitioner's motion for default judgment. The due date of the opinion was extended until February 5, 1990, due to a heavy case backlog resulting from a pending public utility case. I regret any inconvenience that this delay may have caused.

FINDING OF FACTS

The facts needed to decide this motion are brief and undisputed:

1. Petitioner, Angelo Bracoloni, is employed by the Princeton Regional Schools as a teacher. On April 29, 1988, petitioner alleges that he suffered a work related injury when a plant suspended from a classroom ceiling fell and struck him, causing him to be absent from school until September of 1988.

2. The Princeton Regional Schools continued to pay petitioner through June 30, 1988, to the end of the school year. Petitioner returned to work in September 1988, and has brought this action to recover benefits under *N.J.S.A.* 18A:30-2.1 for the months of July and August.

3. So far as I am aware petitioner has not filed any claim with the Division of Workers' Compensation for this injury.

ISSUE

The question on the Board's motion is whether this matter should be dismissed for lack of jurisdiction, pending resolution by the Division of Workers' Compensation.

DISCUSSION AND CONCLUSION OF LAW

Respondent Board argues that the Commissioner of Education has no jurisdiction to entertain petitioner's sick leave injury claim under *N.J.S.A.* 18A:30-2.1 because exclusive original jurisdiction over such claims has been vested in the Division of Workers' Compensation by *N.J.S.A.* 34:15-49. The petitioner teacher responds that *N.J.S.A.* 18A:30-2.1 empowers the Commissioner to award sick leave injury pay while the injured employee is awaiting a determination of the Division of Workers' Compensation.

The Division of Workers' Compensation has been granted jurisdiction over all claims for Workers' Compensation benefits. *N.J.S.A.* 34:15-49 expressly provides that "[t]he Division of Worker's Compensation shall have the exclusive original jurisdiction of all claims for Worker's Compensation benefits under this chapter. . . ." The Supreme Court has interpreted "exclusive original jurisdiction" as used in *N.J.S.A.* 34:15-49 to mean "that worker's compensation cases must arise in the first instance in the Workers' Compensation Division." Handleman v. Marwen Stores Corp., 53 N.J. 404, 412 (1969). See Also, Theodore v. Dover Bd. of Ed., 183 N.J. Super. 407, 444, A 2d 60 (App. Div. 1982). The Division of Workers' Compensation can exercise only those powers legislatively conferred or reasonably implied. McLean v. S & L Steel Co., 141 N.J. Super. 564, 566 (App. Div 1986). Any reasonable doubt of the existence of a particular power in the Division is to be resolved against such power Conway v. Mister Softee, Inc., 51 N.J. 254, 258 (1968).

The Workers' Compensation Law makes no reference to the Commissioner of Education's power to make payments to injured teachers. As to the Commissioner's authority to grant sick leave benefits, *N.J.S.A.* 18A:30-2.1 provides that:

> [w]henever any employee, entitled to sick leave under this chapter, is absent from his post of duty as a result of a personal injury caused by an accident arising out of and in the course of his employment, his employer shall pay to such employee the full salary or wages for the period of such absence for up to one calendar year without having such absence charged to the annual sick leave or the accumulated sick leave provided in section 18A:30-2 and 18A:30-3. Salary or wage payments provided in this section shall be made for absence during the waiting period and during the period the employee received or was eligible to receive a temporary disability benefit under Chapter 15 of Title 34, labor and Workmen's Compensation, of the Revised Statutes. Any amount of salary or wages paid or payable to the employee pursuant to this section shall be

> reduced by the amount of any workmen's compensation award made for temporary disability. (Emphasis Added) Id.

In Forqash v. Lower Camden County School, N.J. Super. 461 (App. Div. 1985) the Appellate Division held that the Division of Workers' Compensation was entitled to exercise primary jurisdiction over a teacher's controverted claim for work related injuries in view of "exclusive original over jurisdiction, which had been legislatively conferred. The Appellate Division stated:

> [a]s the express function of *N.J.S.A.* 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited time period, a proceeding pursuant to that statute may not be utilized to supplant the function of the compensation court. By its terms, this statute contemplates a prior determination of a compensable injury by the compensation court by consideration by the Commissioner of the eligibility of the injured employee for the additional benefits provided by the statute. (Emphasis Added) Id.

The issue of the relationship between the Commissioner's authority under *N.J.S.A.* 18A:30-2.1 and the exclusive original jurisdiction of the Division through *N.J.S.A.* 34:15-49 was recently addressed by the State Board of Education and Commissioner of Education (and by me) in Sharon Tompkins v. Hamilton Bd. of Ed., 11 *N.J.A.R.* 520 (1987). The State Board, reversing the Commissioner (and me), held that, where there is a dispute as to causal connection between the injury and the workplace, the Commissioner did not have authority to award sick leave benefits under *N.J.S.A.* 18A:30-2.1, until the Division had determined eligibility for Worker's Compensation under *N.J.S.A.* 34:15-49. Because there is a dispute as to causal connection in this case, the state Board's ruling in Tompkins controls. In light of the above authority, petitioner's claim with the Department of Education is premature since the Workers' Compensation Division has not yet acted: his petition should be dismissed.

For the reasons set forth, I **CONCLUDE** that respondent's motion to dismiss should be granted because the petitioner may not seek relief in this case from the Department of Education until the Division of Workers' Compensation has exercised its "exclusive original jurisdiction."

ORDER

Based upon the above findings of fact and conclusions of law, it is **ORDERED** that petitioner's appeal is **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

2.5.90
DATE

Richard J. Murphy
RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

2/6/90
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 8 1990
DATE

Jacquee LaVecchia
OFFICE OF ADMINISTRATIVE LAW

ct

ANGELO BRACOLONI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE PRINCETON REGIONAL SCHOOL DISTRICT, MERCER COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful consideration, the Commissioner concurs with the ALJ that Sharon Tompkins v. Bd. of Ed. of Hamilton Twp., Mercer County, decided by the State Board of Education on December 4, 1987, is controlling in this matter. The Commissioner therefore has no authority to award sick leave benefits to petitioner under N.J.S.A. 18A:30-2.1 until the Division of Workers' Compensation has made a determination regarding the causal connection between petitioner's injury and the workplace and his eligibility for benefits under N.J.S.A. 34:15-49.

Accordingly, for the reasons stated in the initial decision, the Commissioner accepts the recommendation of the ALJ dismissing the instant Petition of Appeal and adopts it as the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7137-89
AGENCY DKT. NO. 282-9/89

ANNA LYNCH,

Petitioner,

v.

WEST MORRIS REGIONAL HIGH SCHOOL BOARD OF EDUCATION,

Respondent.

Nancy Iris Oxfeld, Esq, for petitioner
(Klausner, Hunter, Oxfeld, attorneys)

David B. Rand, Esq., for respondent
(Rand, Algeier, Tosti & Woodruff, attorneys)

Record Closed: January 8, 1990 Decided: January 30, 1990

BEFORE **WARD R. YOUNG,** ALJ:

Petitioner, a tenured teaching staff member, claims entitlement to a position of teacher of English as the result of the Board's employment of three non-tenured teachers after petitioner was terminated from her position as teacher of Compensatory Education/Reading.

The Board denies petitioner's claim and asserts the matter should be dismissed for an untimely filing in violation of N.J.A.C. 6:24-1.2(b).

The matter was transmitted to the Office of Administrative Law as a contested case on September 21, 1989 pursuant to N.J.S.A. 52:14F-1 et seq., and was preheard on November 1, 1989, at which the parties agreed to submit the matter for summary decision.

Notwithstanding that counsel for the parties failed to attach evidentiary documents to the jointly executed stipulation of facts, the matter is deemed to be ripe for summary decision as the stipulations incorporate all relevant facts. The record closed on January 8, 1990 at the expiration of the briefing period. Neither party exercised the option to file responsive briefs.

It is noted that no applications to intervene/participate pursuant to N.J.S.C. 1:1-16.1 were filed.

The following stipulated facts are adopted as **FINDINGS OF FACT:**

1. Petitioner, Anna Lynch ("Petitioner") is a tenured teaching staff member formerly employed by the respondent, West Morris Regional High School District Board of Education ("Board"). The District is comprised of two high schools: West Morris Central High School and West Morris Mendham High School.

2. The following is petitioner's employment history with the Board:

   (a) Petitioner was initially hired on February 1, 1982 as a Compensatory Education/Reading Teacher. At the time she was hired, she held certification as an Elementary Teacher and as a Teacher of Reading.

   (b) Petitioner served the district as a Compensatory Education Teacher/Reading Teacher from the date of her initial hire through June 30, 1989 with the exception of the 1985-1986 and 1988-1989 school years. During these years she was on approved maternity leaves.

3. On March 22, 1989, petitioner was notified that the Board would be terminating her employment as a Compensatory Education Teacher/Reading Teacher effective June 30, 1989 due to a reduction in force.

4. Thereafter, petitioner applied for available Teacher of English positions within the school district. Petitioner had acquired a Teacher of English Certification in September 1988. She never served as a Teacher of English, either for the Board or elsewhere.

5. Petitioner was interviewed for the English vacancies but was not recommended for these positions. By letter dated June 22, 1989, Superintendent of Schools Jack DeTalvo notified petitioner that her application for a position as Teacher of English had been rejected.

6. Presently, the Board employs Patricia Milano, Judith Hutnik and Deborah Kent as non-tenured Teachers of English. Ms. Hutnik was hired on July 18, 1989 and Ms. Kent was hired on June 19, 1989. Both commenced employment with the Board effective September 1, 1989. Additionally, Brian Chike was hired as Teacher of English on August 15, 1989 but resigned shortly thereafter and was replaced by Patricia Milano who was hired on October 17, 1989. Neither Milano, Hutnik, Kent nor Chike had been employed by the Board prior to these dates.

The timeliness issue will be first addressed.

The Petition was filed with the Commissioner of Education on September 7, 1989.

The Board argues the cause of action occurred when petitioner was noticed on March 22, 1989 of her employment termination as a teacher of Compensatory Education/Reading due to a reduction in force.

Petitioner argues the 90-day period for filing began to run when the Board employed the three non-tenured teachers, which commenced on June 19, 1989 and continued to October 17, 1989.

I reject the arguments of both parties. N.J.A.C. 6:24-1.2(b) requires the filing no later than the ninetieth day "from the date of receipt of the notice of a final order, ruling, or other action . . . which is the subject of the contested case hearing" (emphasis added). The issue herein was triggered by the Board's failure to employ petitioner as a Teacher of English. Her application for such a position was rejected by notice of the Superintendent under date of June 22, 1989. It is not known whether said rejection was by the Superintendent or the Board, which I deem to be irrelevant as the date of receipt of the notice is determined to be the cause of action.

I **FIND** the cause of action occurred on June 22, 1989 and the 90-day period would expire on September 20, 1989 (see, New Jersey Lawyers Diary) and further **FIND** the Petition to have been timely filed. I **CONCLUDE** this issue be be therefore **DISMISSED.**

THE ENTITLEMENT ISSUE

I find it significant to first clarify the issue. Petitioner is not contesting her employment termination as a teacher of Compensatory Education/Reading caused by the reduction in force. Nor is petitioner claiming her entitlement to employment as a teacher of English due to a seniority right. Her entitlement claim is based solely on her contention that her tenure right grants her the priority and preference over non-tenured applicants as a matter of law.

It is undisputed that petitioner is a tenured teaching staff member, and that she is entitled to placement on a preferred eligibility list as a teacher of Compensatory Education/Reading. It is also not disputed that petitioner acquired certification to teach English prior to the reduction in force.

ARGUMENTS OF COUNSEL

Petitioner cites Capodilupo v. W. Orange Tp. Ed. Bd., 218 N.J. Super. 510 (App. Div. 1987) and Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239 (App. Div. 1987) in support of her contention she is entitled to preference over non-tenured employees with the same certification.

The Board first cites Grosso v. Bd. of Ed. of the Boro of New Providence, 1989 S.L.D. ____ (decided May 22, 1989) for the proposition that the scope of tenure rights is determined by the endorsement under which the petitioner served. De Carlo v. South Plainfield Bd of Ed., 1988 S.L.D. ____ (decided August 8, 1988) is also cited in support of that proposition. The Board also cites Grossman v. Ramsey Bd. of Ed., 1988 S.L.D. ____ (decided November 7, 1988), aff'd State Board March 1, 1989, in further support of its contention that mere acquisition of an additional endorsement does not entitle a teacher to additional tenure and seniority rights, and that actual service under an additional endorsement is required.

DISCUSSION

It must first be noted, as previously stated, there is no seniority issue herein. If that were so, notwithstanding that seniority does not accrue until one acquires tenure, neither petitioner nor the three applicants employed to teach English taught same prior to September 1, 1989. Their accrual would therefore be zero.

Case law cited by the Board must be examined. Grosso was a tenured teacher of Business who was terminated by a reduction in force (RIF). He claimed employment as an elementary teacher over any of six non-tenured teachers who had been employed prior to petitioner's RIF on the basis that he possessed an elementary endorsement. His petition was dismissed by the Commissioner because Grosso had never served under his elementary endorsement.

De Carlo, a tenured supervisor, was noticed of his reassignment as a guidance counselor due to an administrative reorganization and claimed employment in one of four newly created positions of assistant principal. The new positions were filled by persons not tenured as assistant principals. One was filled by the then Guidance Director, which created a vacancy in the latter, which was then filled by one who was not tenured in any supervisory capacity. The Commissioner held that De Carlo had not accrued any rights beyond the role of supervisor, but ordered the Board to place him in the position of Guidance Director.

Grossman, a tenured teacher of business studies, contested the Board's reduction of her hours of employment from full-time to part-time while assigning a non-tenured teacher to teach marketing, and also claimed greater seniority than staff members teaching law and distributive education courses. The Commissioner dismissed the Petition on the basis that Grossman was not currently properly certificated to vie for any of the positions claimed either on the basis of tenure or seniority. The Commissioner therein stated at 25 that "mere acquisition of an additional endorsement in that area, under which she never served does not entitle her to tenure and seniority rights in an area of later-acquired certification," and expressed a concern of the assertion of bumping rights over those who have served under proper certification if he held otherwise.

In the instant matter, petitioner and the applicants employed to teach English all possessed the required endorsement under the instructional certificate to qualify for the position at issue. Neither petitioner nor the applicants employed ever served in the respondent's district under the endorsement required. The only significant difference between petitioner and the successful applicants is that the petitioner is a tenured teaching staff member in respondent's school district.

The instant matter is distinguished from Grossman on the basis of certification. It is distinguished from Grosso in that no vacancy existed in the position claimed, and that success on his claim would have required an exercise of bumping rights which was rejected in Fitzpatrick v. Weehawken Bd. of Ed., 1982 S.L.D. 1500.

Bednar is the most recent decision of the Appellate Division which addresses the issue herein. I **FIND** it controlling in this instance. The court said at 241 that "Bednar's statutory tenure rights, wholly apart from seniority, bar the school district from reducing his hours while retaining a full-time non-tenured art teacher." One may misconstrue the court's determination as endorsing a bumping right. It would appear that the Board simply reduced the employment hours of the wrong teaching staff member. This is further addressed at 243 when the court said that "N.J.S.A. 18A:28-10 declares only the rights inter sese of tenured teachers in a RIF. . . . But, the statute does not authorize regulatory dilution of tenure rights by affording a non-tenured teacher 'seniority'."

It is noted that the determination herein is in accord with the Commissioner's Order to place De Carlo in the position of Guidance Director. No comment is made herein on the Commissioner's decision in Grosso, other than it appears to fly in the face of Bednar.

I **CONCLUDE** the action of the West Morris Board in giving preference to non-tenured applicants over petitioner for the position of English teacher violated petitioner's tenure right.

The West Morris Regional Board of Education is hereby **ORDERED** to reemploy Anna Lynch in the position of teacher of English, and to compensate her with back pay since September 1, 1989 in accordance with her placement on the salary guide for the 1989-90 school year as if she had not been terminated. Said compensation shall be mitigated by other earnings for services rendered during the regular hours of the school day.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with Saul Cooperman for consideration.

26 January 1990
DATE

Ward R. Young
WARD R. YOUNG, A.L.J.

2/2/90
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

FEB 2 1990
DATE

Mailed To Parties:
FOR OFFICE OF ADMINISTRATIVE LAW

g

ANNA LYNCH,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE WEST MORRIS REGIONAL HIGH SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by respondent ("the Board") and replies thereto by petitioner.

The Board first excepts to the ALJ's finding that petitioner's appeal was timely filed, reiterating its argument that tolling of the 90-day limit should have begun on March 22, 1989, the date of petitioner's termination, as she was aware on that date of vacancies in English positions in the district. In turning to the merits of petitioner's claim, the Board reiterates its reliance on Grosso, supra, DeCarlo, supra, and Grossman, supra, and asserts that the ALJ misconstrued Capodilupo, supra, and Bednar, supra, as conferring upon tenured teachers a right to positions in all endorsements held regardless of whether or not they had served under such endorsements.

In reply, petitioner notes that the Board's allegation that she was aware of vacancies in English on the date of her rif is both untrue and unsupported by the record. While concurring with the ALJ that her petition was timely filed, she also argues that her cause of action occurred on the date of the district's hiring of a nontenured teacher in a position for which she was qualified (June 19, 1989), not on the date of her notice of non-hiring (June 22, 1989), as that notice did not indicate to petitioner that the successful candidate had no right to the position superior to hers. On the merits of her claim, petitioner reiterates her reliance on Bednar, supra, and Capodilupo, supra, and further cites Barbara Ellicott v. Bd. of Ed. of Frankford Township, Sussex County, decided by the Commissioner August 17, 1989 for the proposition that tenure attaches to the position of teacher regardless of the subject matter taught, as instructional activities are generic in nature. In response to the Board's reliance on Grosso, supra, petitioner notes that on January 17, 1990, the Legal Committee of the State Board of Education issued a report in which it was recommended that the Commissioner's decision in Grosso be reversed, holding instead that tenure protection attaches to all endorsements on a teacher's instructional certificate.

In making his determination in the present matter, the Commissioner must first note that, subsequent to the ALJ's rendering of his initial decision and the parties' submission of exceptions and replies, the State Board did in fact reverse the Commissioner's determination in Grosso in a decision dated March 7, 1990. In its decision, the Board held that

> Given the statutory scheme, we have no choice but to conclude that tenure is achieved in and tenure protection attaches to all endorsements upon a teacher's instructional certificate, not just those under which the individual has actually served for the requisite period of time pursuant to N.J.S.A. 18A:28-5 or 18A:28-6. Tenure attaches to a position, and "teacher" is a separately tenurable position under N.J.S.A. 18A:28-5.***
>
> We find no basis in Capodilupo or Bednar for concluding that tenure is obtained "within an endorsement on an instructional certificate." To the contrary, we find that those Appellate Division decisions are clear expressions of Petitioner's assertion that the scope of his tenure protection extends to all endorsements on his instructional certificate. The scope of the position in which a teacher may be entitled to tenure protection is merely limited by the scope of his or her endorsements. This limitation is predicated on the fact that the assignments that a staff member is qualified to fill are similarly limited.***
>
> Since petitioner was authorized and qualified to serve as an elementary teacher by virtue of his elementary education certificate, N.J.A.C. 6:11-6.2(a)(6), we conclude that he had entitlement as a result of his tenure status to employment as an elementary teacher as against non-tenured individuals, regardless of whether he had previously served under that endorsement. (emphasis in text) (Slip Opinion, at pp. 4-6)

Clearly, the decision of the State Board is controlling in the instant matter, where the fact patterns for purposes of tenure entitlement are virtually identical to those in Grosso, supra. It is undisputed that petitioner obtained tenure in the district while serving as a Compensatory Education/Reading Teacher and that, at the time of her termination, she possessed an endorsement which fully qualified her to teach English although she had never served under it. Consequently, consistent with the State Board's decision in Grosso, the Commissioner must now hold that by virtue of having attained tenure as a teacher and holding the instructional endorsement necessary to teach English, petitioner is entitled as a matter of law to employment, as against nontenured individuals, as an English teacher in the West Morris Regional School District.

With respect to the question of timeliness, the Commissioner notes that the plain language of regulation speaks to notice of the final action which is the cause of dispute, so that, strictly speaking, petitioner's 90-day filing period should be tolled from the date upon which she became aware that a nontenured teacher was hired to fill a position for which she was qualified. The record before me does not permit this determination to be made, establishing only that the Board hired a nontenured English teacher on June 19, 1989; that petitioner was notified on or about June 22, 1989 of her rejection for this position; and that the June 22 notice did not in itself serve to indicate that a person with less entitlement than she was hired. However, because petitioner's appeal was timely filed reckoning even from the earliest possible date on which her initial cause of action could be found to have arisen (June 19), I find no necessity for further proceedings or determinations on my part regarding this matter.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons stated therein, together with the additional reasons set forth above, and is adopted as the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

Pending State Board

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 1456-89
AGENCY DKT. NO. 22-2/89

HENRY J. FOX,
Petitioner,
v.
BOARD OF EDUCATION
OF THE TOWNSHIP OF NEPTUNE,
MONMOUTH COUNTY,
Respondent.

Stephen B. Hunter, Esq., for petitioner (Klausner, Hunter & Oxfeld, attorneys)

James T. Hundley, Esq., for respondent (Patterson and Hundley, attorneys)

Record Closed: September 5, 1989 Decided: February 5, 1990

BEFORE **RICHARD J. MURPHY,** ALJ:

Statement of the Case

Petitioner Henry J. Fox appeals to the Commissioner of Education from the action of the respondent Board of Education (Board) in debiting his sick leave against a leave of absence due to a work-related injury, allegedly in violation of *N.J.S.A.* 18A:30-2.1. The respondent Board counterclaims for an overpayment to the petitioner. The parties have filed cross-motions for dismissal under *N.J.A.C.* 6:24-1.2(b) on the grounds of timeliness and, for the reasons set forth, those motions are granted.

Procedural History

(1) Date transmitted to the Office of Administrative Law: February 28, 1989;
(2) Prehearing: May 3, 1989;
(3) Initial hearing dates: August 4 and 7, 1989 (adjourned pending cross-motions for partial summary decision);
(4) Record Closed: September 5, 1989 (on receipt of petitioner's response to respondent's cross-motion for partial summary decision);
(5) Extended decision date: February 5, 1990 (due to a heavy case backlog resulting from a pending public utilities case).

Findings of Fact

The facts necessary to decide these motions are not in dispute.

Petitioner was absent a total of 290 days between October 24, 1984 and June 13, 1988 due to a work-related injury on March 16, 1984. The period of forty three (43) days between October 24, 1984 and October 24, 1985 was exempt from being charged against his annual and accumulated sick leave. Petitioner claims that the remaining two hundred and forty seven (247) days of absence between October 24, 1985 and June 13, 1988 should have been charged against his annual and accumulated sick leave. On September 30, 1988, Acting Superintendent Michael T. Lake sent a letter to petitioner Henry J. Fox advising him that no further paychecks would be issued to him. The letter further requested that the petitioner have his attorney contact the Board's attorney to discuss the matter. On October 31, 1988, Lucille Alfano, President of the Neptune Township Education Association, wrote to Acting Superintendent Lake on behalf of the petitioner requesting that his "accumulated sick days be utilized and that he be paid his appropriate salary until such determination is made regarding his injury." The Board attorney responded on November 8, 1988 to President Alfano. Petitioner's counsel advised President Alfano that the petitioner had received an overpayment of sick leave benefits and that Board Secretary/Business Administrator Antoinette Ruggieri had been requested to calculate the amount of the overpayment and to present the information to the Board for review.

On February 3, 1989, the petitioner filed a petition of Appeal to the Commissioner seeking, among other things, payment by the respondent of his accumulated sick leave during the 1988-89 school year up to March 1, 1989, the

effective date of his ordinary disability retirement. On February 28, 1989, the respondent filed an answer and counterclaim seeking recovery of $17,264-50, which allegedly represented overpayment of sick leave benefits to petitioner through September 15, 1988.

There is no dispute as to the above facts and I so **FIND:**

The petitioner has filed a Motion for Partial Summary Decision seeking dismissal of respondent's counterclaim on the ground that the counterclaim was filed beyond the 90-day time period established by *N.J.A.C.* 6:24-1.2. The respondent has filed a cross-motion for partial summary decision seeking dismissal of petitioner's counterclaim on the same grounds.

Issues

(1) Is petitioner's appeal time barred by *N.J.A.C.* 6:24-1.2?

(2) Is respondent's counterclaim for overpayment also barred by that regulation?

Discussion and Conclusions of Law

(1) Petitioner's appeal

Petitioner filed his petition with the Commissioner of Education pursuant to *N.J.S.A.* 18A:6-9, which provides, in part,

> [t]he Commissioner shall have jurisdiction to hear and determine, without cost to the parties, all controversies and disputes arising under the school laws, excepting those governing higher education or under the rules of the state board or of the commissioner. [Emphasis added]

The procedure for initiating a contested case before the Commissioner is set forth in *N.J.A.C.* 6:24-1.2:

> (a) [t]o initiate a contested case for the Commissioner's determination of a controversy or dispute arising under the school laws, a Petitioner shall serve a copy of a petition upon

> each Respondent. The Petitioner then shall file proof of service and the original petition with the Commissioner c/o Director of the Bureau of Controversies and Disputes, New Jersey Department of Education, 225 West State Street, CN 500, Trenton, New Jersey 08625.
>
> (b) The Petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the District Board of Education which is the subject of the requested contested case hearing. [Emphasis Added]

The petitioner argues that the Board attorney's letter of November 8, 1988 to Lucille Alfano triggered the 90-day time limitation imposed by *N.J.A.C.* 6:24-1.2 and that the Petition of Appeal on February 3, 1989 was therefore timely filed. The respondent counters that the September 30, 1988 letter terminating salary payments to the petitioner constituted "notice of a final order" and that the Petition of Appeal filed on February 3, 1989 was therefore time-barred.

Petitioner's request that the Board utilize his accumulated sick leave days from 1984-1989 is not a "statutory entitlement" and is therefore subject to the time-bar provisions of *N.J.A.C.* 6:24-1.2. See, North Plainfield Education Ass'n v. Bd. of Education, 96 N.J. 587 (1984) (where the Court was asked to determine whether the petition to the Commissioner of Education by two teachers who sought credit on the salary scale for time spent on sabbatical was time-barred by *N.J.A.C.* 6:24-1.2). *N.J.S.A.* 18A:30-2.1 establishes the Board's obligation to pay the petitioner his salary without charging the absence to his annual sick leave or accumulated sick leave. It provides, in part, that the "employer shall pay to such employee the full salary or wages for the period of such absences for up to one calendar year . . ." *N.J.S.A.* 18A:30-2. Here, it appears that the Board satisfied the dictates of *N.J.S.A.* 18A:30-2.1 by paying the petitioner his full salary (less Workers' Compensation benefits) during the period from October 24, 1984 to October 24, 1985. The petitioner is thus subject to the time-bar provisions of *N.J.A.C.* 6:24-1.2, if he sought to dispute the Board's action in terminating his salary. *N.J.A.C.* 6:24-1.2 provides, ". . . [t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district Board of Education which is the subject of the requested contested case hearing". *N.J.A.C.* 6:24-1.2(b).

On its face, the letter dated September 30, 1988 should have put the petitioner "on notice of a final order" as required by *N.J.A.C.* 6:24-1.2. The letter specifically informed him that the Board would not issue him any further paychecks and that he was "not eligible for continued pay leave". The letter further requested that the

petitioner have his attorney contact the Board attorney to discuss the matter. The letter unequivocally rejects or refuses to honor the petitioner's request for accumulated sick leave. Petitioner argues that the November 8, 1988 letter triggered the 90-day time period because it put him on notice of a recoupment action being contemplated by the Board. The petitioner, however, initially appealed the fact that the Board did not allow him to utilize his accumulated sick leave during the 1988-89 school year. I **CONCLUDE** that he was put on notice of this action by the letter of September 30, 1988 and that his appeal is time-barred under *N.J.S.A. 6:24-1.2*.

(2) Respondent's Counterclaim Time-Barred

N.J.A.C. 6:24-1.2 also applies to local Boards of Education, since there are not any specific regulations establishing lesser or greater periods in which Boards may file actions with the Commissioner. Respondent argues that the November 29, 1988 meeting between petitioner's union representatives and the Board secretary to review petitioner's records was the first action taken by the respondent concerning its recoupment action and that this date triggered the 90-day filing period. The respondent, however, was aware that it had allegedly overpayed the petitioner long before that date. In its letter dated September 30, 1988, respondent notified petitioner that he was "not eligible for continued paid leave" and that research into his case would be initiated "to resolve any outstanding monetary payment" issued to him. This letter indicates that the respondent had "notice" of the alleged overpayment. Any doubt regarding respondent's notice was quelched by respondent's letter of November 8, 1988, explicity asserting that the Board "appeared" to have made an overpayment and that the exact amount would be calculated. The respondent takes the position that the overpayment was due to a "misinterpretation of *N.J.S.A.* 18A:30-2.1, and that it is entitled to recover such funds," but the record, shows no indication that the overpayment was due to a misinterpretation of existing law. The respondent also submits that no "action by the Board Secretary and presented to the Board for review." However, the respondent had knowledge as memorialized in the letters dated September 30, 1988 and November 8, 1988, which constitutes sufficient notice for purposes of *N.J.A.C.* 6:24-1.2. Respondent's counterclaim is therefore time-barred under that regulation and I so **CONCLUDE.**

Disposition

On the basis of the above findings of fact and conclusions of law it is **ORDERED** that petitioner Henry J. Fox's appeal, as well as the Counterclaim of the respondent Board of Education of the Township of Neptune, in Monmouth County be **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

2.5.90
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

2/6/90
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

1990
DATE

OFFICE OF ADMINISTRATIVE LAW

ct

HENRY J. FOX,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Petitioner agrees with the ALJ's Findings of Fact and Conclusions of Law regarding dismissal of the counterclaim filed on behalf of the Neptune Township Board of Education. However, he excepts to the ALJ's determination that the Petition of Appeal is time barred pursuant to N.J.A.C. 6:24-1.2, the 90-day rule. In so concluding, petitioner argues as he did in his post-hearing submission that his petition was filed within 90 days of receipt of the Board attorney's November 8, 1988 letter, which document "***could possibly be read as being representative of some type of final ruling by at least a designee of a Local Board of Education. Clearly, the September 30, 1988 letter relied upon by the ALJ could not possibly be viewed as a document that could put one on notice of a final order on (sic) ruling by a Local Board of Education." (Petitioner's Exceptions, at p. 2)

Petitioner further avers that correspondence between his union representative and the Board attorney clearly indicates that "***even as of November 8, 1988 it was indeed questionnable (sic) as to whether the District Board of Education was even aware of the controversy regarding Henry Fox's entitlements to the use of his accumulated sick leave during the 1988-89 academic year." (Id.)

In support of these conclusions, counsel for petitioner contends:

> Petitioner has maintained, in light of correspondence annexed to these Exceptions as Exhibit B (this is Exhibit A attached to Petitioner's Summary Decision papers which are also enclosed herein), that as of May 20, 1988 the Board Secretary/Board Business Administrator James Cummings, after communicating with the appropriate authorities, expressed to Henry J. Fox and his union representatives that Fox would

> receive payments pursuant to N.J.S.A. 18A:30-2.1 through June 30, 1988 and thereafter; i.e. during the 1988-89 school year, would be able to utilize his accumulated sick leave until the effective date of his disability retirement during the 1988-89 school year. Significantly, it is uncontroverted, consistent with the Board Secretary/Board Administrator's actions of May 20, 1988 (as memorialized in the attached correspondence), that Henry Fox received his appropriate bi-weekly salary on or about September 15, 1988. "Out of the blue" Henry Fox received a letter (Exhibit A annexed to these Exceptions) that advised him that "on advise (sic) of counsel" the Acting Superintendent of Schools would not authorize the issuance of a pay check to him on September 30, 1988. Henry Fox was advised that "it (was) the opinion of Attorney Hundley that you are not eligible for continued paid leave ..." Henry Fox was also advised that he should have his Attorney contact the Board's Attorney "in the very near future to discuss (his) case". (Id.)

For the above-stated reasons, petitioner submits that the Commissioner should reverse the ALJ's conclusion that his Petition of Appeal is untimely. He seeks to have the matter remanded to the Office of Administrative Law for an evidentiary hearing on his claims.

Upon his careful and independent review of the instant matter, the Commissioner affirms the conclusion of the ALJ below dismissing the Petition of Appeal but rejects the ALJ's conclusion that the Board's counterclaim for recoupment pursuant to N.J.A.C. 6:24-1.2 is untimely. He so concludes for the reasons which follow, not those set forth by the ALJ below.

In resolving the timeliness issues raised in both the instant petition and counterclaim, the threshold inquiries concern what constitutes notice of a final ruling or action and when each party acquired such notice.

As to when the Board had notice that it had allegedly overpaid petitioner, it is uncontested that the Board through its agent, the Board attorney, directed an audit be conducted by Mrs. Ruggieri, the Board Secretary/Business Administrator, which audit was completed on November 28, 1988. On that date, and not before, the Board was put on notice of the exact amount allegedly owed by petitioner for salary overpayments following his injury in March of 1984. (See Board's Brief in Opposition to Petitioner's Motion for Partial Summary Decision, dated August 7, 1989, at pp. 13-14.) See also Board's Exhibit F - Letter from James T. Hundley dated November 8, 1988 addressed to Ms. Lucille Alfano. (Petitioner's Exhibit D in Exceptions) The cause of action for recoupment of said overpayment arose once the amount allegedly

overpaid had been calculated and made known to the Board. In this case, that date was November 28, 1988. The Board filed its counterclaim for recoupment on February 24, 1989, 86 days later. Accordingly, the Board's counterclaim was timely filed pursuant to N.J.A.C. 6:24-1.2.

As to the timeliness of the Petition of Appeal, the Commissioner first notes that all correspondence that took place before the submission of the Petition of Appeal concerning petitioner's claim was conducted among the Acting Superintendent, the Board attorney, petitioner's union representative, Ms. Lucille Alfano, and petitioner himself. Both the Acting Superintendent and the Board attorney are Board agents. At no time did either petitioner or his union representative contest before the Board the information provided in the September 30, 1988 letter from the Acting Superintendent to Mr. Fox or in the November 8, 1988 letter to Ms. Alfano from the Board attorney. Accordingly, petitioner must be found to have accepted as Board approved, that information supplied in those letters, as well as that information secured as a result of the meeting on September 29, 1988 following the audit of the alleged overpayment.

In carefully perusing said documents, it is clear to the Commissioner that petitioner was fully on notice by September 30, 1988 that 1) he would not receive any further payments of salary from the Board; 2) that he was not eligible for continued paid leave relative to accumulated sick leave and 3) that the Board intended to pursue recourse on recoupment of alleged monetary payments. That the letter from the Board attorney to N.T.E.A. President Lucille Alfano clarifies the statements made by Acting Superintendent does not alter the fact that disposition was made known to petitioner via the September 30, 1988 correspondence. Therefore, Ms. Alfano's letter of October 31, 1988 to Mr. Lake, the Acting Superintendent, which petitioner seeks to have the Commissioner establish as that event triggering the 90-day time period, represents nothing more than a further appeal to the exact same authority that first apprised him of his status with the Board. Requests for reconsideration of a final board action do not toll the running of the 90-day rule. See Marvin J. Markman and Susan M. Markman v. Board of Education of the Township of Teaneck, Bergen County, et al., decided by the Commissioner August 22, 1986. The Commissioner so finds.

Accordingly, for the reasons stated herein, as well as those expressed by the ALJ, the instant Petition of Appeal is found to be out of time pursuant to the prescriptions of N.J.A.C. 6:24-1.2. However, the Commissioner rejects that portion of the initial decision finding the Board's counterclaim untimely, and accordingly, remands for resolution of those matters raised in the counterclaim to the Office of Administrative Law.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

HENRY J. FOX,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF NEPTUNE, MONMOUTH COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 16, 1990

For the Petitioner-Appellant, Klausner & Hunter
(Stephen B. Hunter, Esq., of Counsel)

For the Respondent-Respondent, Patterson & Hundley
(James T. Hundley, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

August 1, 1990

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 9371-88
AGENCY DKT. NO. 375-12/88

GEORGE C. PIERSON,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,
Respondent

Wayne J. Oppito, Esq., for petitioner

Patrick C. English, Esq., for respondent (Dines & English, attorneys)

Record Closed: December 29, 1989 Decided: February 2, 1990

BEFORE **ARNOLD SAMUELS**, ALJ:

The petitioner, George C. Pierson, an employee of respondent, the City of Clifton School District (Board), appeals from a denial by the respondent of his claim for reimbursement of $10,000 in legal fees he paid to an attorney.

PROCEDURAL HISTORY

The petitioner filed a verified petition with the Commissioner of Education on December 5, 1988, claiming that he was entitled to be reimbursed for a $10,000 legal

fee payment in accordance with the provisions of *N.J.S.A.* 18A:16-6.1. The Board filed an answer on December 15, 1988, essentially alleging that petitioner's claim did not qualify for reimbursement under the statute.

The Commissioner of Education transmitted the matter to the Office of Administrative Law on December 22, 1988, for hearing and determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.* A prehearing conference was held by the Office of Administrative Law on July 25, 1989, and a prehearing order was filed, which defined the issues, fixed a hearing date, provided for discovery, and dealt with other procedural matters related to the forthcoming hearing.

The Board filed a motion for summary decision, which reached the Office of Administrative Law on November 8, 1989. (For some reason, the motion was filed with the Commissioner of Education, despite the fact that the matter had been transmitted to the Office of Administrative Law ten months earlier.) The petitioner filed papers in opposition on November 9, 1989, and a reply memorandum was filed by respondent on November 16, 1989. Since oral argument was requested and the plenary hearing was scheduled to be held on November 21, 1989, counsel were advised that insufficient time remained before the hearing for the motion to be argued and decided, and the arguments presented would be considered at the end of the case, in the initial decision.

The plenary hearing was held on November 21, 1989 in the Office of Administrative Law in Newark, New Jersey. The petitioner, George C. Piersón, testified in his own behalf, and he presented one witness, Miles Feinstein, Esq., the attorney to whom the disputed fee was paid. The respondent did not call witnesses, but relied on the testimony of petitioner and his attorney. Fifteen exhibits were marked in evidence, as described on the list attached to this decision. The parties submitted posthearing briefs and memoranda containing arguments in support of their respective positions, and the record closed on December 29, 1989, when the last submission was filed.

THE ISSUE

The sole issue, as stated in the prehearing order, is as follows:

Whether the Board is obligated to reimburse the legal fee claim to petitioner in accordance with *N.J.S.A.* 18A:16-6.1.

DISCUSSION OF THE TESTIMONY AND EVIDENCE

The petitioner, George C. Pierson, testified that in 1986, when he was Director of Special Education in the Clifton school system, he learned that someone on his staff (a psychologist, Charles E. LePrince) had possibly engaged in child abuse or molestation in previous years. According to the petitioner, he spoke to the Superintendent of Schools about the problem. Then, approximately one year later, criminal charges were filed against Mr. Pierson for having concealed evidence or evaded discovery of an aggravated sexual contact perpetrated against children, in violation of *N.J.S.A.* 2C:29-3c, a crime of the fourth degree. *See*, Exhibit J-1.

The petitioner consulted with the attorney for the Board of Education, who advised him that, because of a possible conflict of interest, it would be best if he retained his own attorney. Mr. Pierson immediately retained Miles Feinstein, Esq., who specializes in criminal matters. The attorney advised Mr. Pierson that his fee could vary between $5,000 and $25,000 for the criminal defense, depending on the amount of time and work involved. In October 1987, Mr. Pierson paid $5,000 to the attorney as an advance retainer.

The petitioner testified that Mr. Feinstein made three municipal court appearances soon thereafter, in the preliminary proceedings. Each appearance was for a half-day, and most of the time was spent waiting. Mr. Pierson stated that the last court appearance made by the attorney was on October 21, 1987, in the Clifton Municipal Court, where a probable cause hearing was scheduled but not held. (It was stipulated that the matter had been referred to the Passaic County Grand Jury without a probable cause hearing.) Mr. Pierson testified that, while waiting for his grand jury appearance, he and the attorney engaged in numerous telephone calls dealing with subjects such as how to respond to inquiries from the press, how to deal with the grand jury, how to handle requests for resignation from his position, etc. The petitioner and Mr. Feinstein then appeared before the grand jury in January 1988. Mr. Pierson's testimony took one day, after waiting and not being reached on an earlier day.

On February 10, 1988, the Passaic County Clerk's Office reported that, after due consideration by the grand jury, no indictment was found against George Pierson. This is known as a "no bill," which effectively eliminates any continued prosecution on the complaint. However, the petitioner testified that he continued to utilize Mr. Feinstein's services after the "no bill" was returned in early February 1988. He believed that the Clifton governing body was looking into the possibility of raising other charges against him.

Grand jury proceedings were still under way in the case against Mr. LePrince, who had been charged with various acts of official misconduct and sexual assault on a student or students. The petitioner was summoned to testify before that grand jury, and he did so in February 1988. Although he had been cleared as a defendant, he was a witness before the grand jury in the LePrince matter. He was represented there, in his capacity as a witness, by Mr. Feinstein. *See*, Exhibit J-5.

Soon thereafter, in late February and March 1988, various persons and agencies sought permission from the court to obtain copies of the grand jury minutes, which normally are confidential and privileged. According to the petitioner, Mr. Feinstein continued to represent him in connection with these proceedings, which were also tied to the LePrince prosecution. No additional charges were filed against Mr. Pierson.

In March 1988, Mr. Feinstein requested payment of an additional $10,000 in legal fees. The petitioner paid this amount to the attorney on March 25, 1988. *See*, Exhibit J-7. At that point, he had paid a total of $15,000 to Mr. Feinstein for legal services. He then requested reimbursement of the entire $15,000 from the Clifton Board of Education. In support of this request, the petitioner submitted copies of his two checks to Mr. Feinstein, dated October 13, 1987 and March 25, 1988. No itemized bill from the attorney was included. *See*, Exhibit J-8.

The Board of Education decided to pay the entire $15,000 to Mr. Pierson in reimbursement, despite the fact that no supporting itemized bill was submitted. The full payment, $15,000, by the Board to the petitioner on May 16, 1988. *See*, Exhibit J-9.

In the meantime, the prosecution against Mr. LePrince was still continuing, and a motion was made in that matter for an order releasing the transcript of grand jury testimony six months earlier (when Mr. Pierson testified), for possible use in the LePrince prosecution. Mr. Feinstein wrote a letter to the assignment judge of Passaic County on June 20, 1988, wherein he consented to relevant portions of the transcripts being turned over to the LePrince defense attorney, provided the information was not publicly disseminated.

Mr. Pierson testified further that he continued to confer with Mr. Feinstein thereafter because the LePrince defense attorneys wanted support and input from him.

On September 8, 1988, Mr. Pierson paid an additional $10,000 to Mr. Feinstein, at the attorney's request. He then requested reimbursement of this additional amount from the Clifton Board of Education, pursuant to the same statute under which the $15,000 was reimbursed in June. This request was denied by the Board in a memorandum to Mr. Pierson from the Board's attorney on September 30, 1988, which stated that the Board could, under no circumstances, be responsible for additional "lump sum" legal fees, without an itemization that would enable the Board to accurately assess the reasonableness of such fees. *See*, Exhibit J-13. An itemized bill was never submitted.

Mr. Feinstein has since continued to represent Mr. Pierson in matters ostensibly collateral to all of the foregoing matters; writing letters, attending meetings, providing various information and engaging in telephone calls. No court appearances have been involved.

When cross-examined, Mr. Pierson acknowledged that Mr. Feinstein never sent any bill or statement after March 1988, when Mr. Pierson submitted the $15,000 voucher that was paid by the Board. After March 1988, the petitioner's next contact with Mr. Feinstein was in June 1988, when the LePrince defense attorneys moved for a copy of the grand jury transcripts. Then, three months later, in September 1988, the LePrince attorneys requested certain notes and records. However, during the period of time since the "no bill" was returned in February 1988, no additional charges had been filed or were pending against Mr. Pierson. Nevertheless, he testified that he felt there was always the threat that new charges might be filed

against him. The petitioner acknowledged that after the $15,000 reimbursement was paid to him by the Board and before the request for additional $10,000 was made, the Board's attorney informed him that an itemized statement of legal services was necessary in order for the Board to consider the question of reasonableness under the statute.

The petitioner's attorney, Miles Feinstein, also testified. He indicated that he initially told Mr. Pierson that he never based his charges on time spent, such as on an hourly basis. After considering the criminal complaint that had been filed against the petitioner, Mr. Feinstein told him in advance that his charges, on a complete case basis, could vary between a minimum of $5,000 and a probable maximum of $25,000.

Mr. Feinstein provided some details of his early representation: ascertaining the facts, appearing in municipal court for arraignment and a bail hearing, speaking to detectives and prosecutors, appearing at the probable cause hearing in municipal court and reviewing all aspects of the case with Mr. Pierson before the grand jury appearance in January 1988. He had to decide if his client should agree to testify before the grand jury, and much consultation revolved around that question. Mr. Feinstein then appeared with the petitioner on the day he testified, and the "no bill" resulted almost immediately thereafter.

Mr. Feinstein then testified to the continuing services he rendered to Mr. Pierson in January and February after the "no bill" was returned. These included requests by the LePrince attorneys and others to obtain copies of the earlier grand jury minutes. According to Mr. Feinstein, he engaged in a substantial amount of consultation and correspondence dealing with this subject, culminating in Mr. Pierson's appearance as a witness before the LePrince grand jury on February 16, 1988. Mr. Feinstein testified that he consulted with Mr. Pierson, primarily because a Clifton police captain was unhappy about the Pierson "no bill" and had charged collusion between Mr. Feinstein and the prosecutor's office. This police captain wanted Mr. Pierson to be investigated further, and he publicized his continuing unhappiness. According to the attorney's testimony, both he and Mr. Pierson were worried about the possibility of new charges, because the principle of double jeopardy does not necessarily apply after a "no bill" is returned by a grand jury.

Mr. Feinstein also testified that he provided additional consultation services to Mr. Pierson because of their concern about possible administrative proceedings against the petitioner's employment by the Board of Education.

In the meantime, the LePrince matter was ongoing, and the police captain mentioned above was still making statements expressing his opinion that Mr. Pierson should be charged with additional or further offenses. This involvement by the police captain came to naught, and he was removed from his position as Captain of Detectives before the LePrince grand jury convened, even though he kept making statements adverse to Mr. Pierson. When asked about the actual effect of these statements, Mr. Feinstein stated, "It just gave us concern."

Referring to his billing, Mr. Feinstein testified that he never billed anything to Mr. Pierson in writing after March 1988. His requests for additional fees were all oral. Furthermore, the attorney stated that he never bills for work done, and he does not make or keep any notes of services rendered, upon which an itemized bill might be based. Mr. Feinstein stated that he considers a total of $25,000 in fees for all of the services rendered to date to Mr. Pierson to be very reasonable, especially in a criminal case in which the man's life, future and well-being was at risk. He stated further that, even if he had not picked up the file since March 1988, he still would have charged $25,000.

FINDINGS OF FACT

The relevant facts involved in this matter are virtually undisputed. However, certain facts need to be emphasized:

The criminal charge against petitioner was issued on October 12, 1987. The charges involved the alleged concealment by Mr. Pierson of evidence of a crime committed by Charles LePrince, a former school psychologist in the respondent district.

Petitioner retained independent counsel at the suggestion of the board attorney.

Petitioner paid his attorney a $5,000 retainer soon thereafter, in October 1987. Counsel had advised Mr. Pierson that the criminal defense could cost anywhere between $5,000 and $25,000, depending on the work required.

The attorney began rendering services immediately, including appearances in the Municipal Court in connection with arraignment and a probable cause hearing (not held), contact with prosecutors and investigators, consultation with his client, and an appearance before the grand jury in January 1988, approximately three months after the complaint was filed.

In January 1988 (communicated to petitioner by letter from the county clerk on February 10, 1988), a "no bill" was issued by the grand jury, stating that after due consideration, no indictment had been found against Mr. Pierson.

Petitioner appeared as a witness before the LePrince grand jury in February 1988, and he was represented by his attorney in connection with that appearance.

In February or March 1988, petitioner's attorney requested payment of an additional $10,000. No bill, itemized or otherwise, was given to the petitioner.

Petitioner paid the $10,000 to his attorney by check dated March 25, 1988 At the same time, he submitted a voucher for reimbursement of the total legal fees paid to date, $15,000, to the Clifton Board of Education.

The Board paid the full $15,000 to petitioner, by check dated May 16, 1988.

Petitioner had no further contact with his attorney from March 1988, when he received the $15,000 reimbursement, until June 1988, when defense attorneys for Mr. LePrince and others moved for copies of the January grand jury transcripts.

No new or additional criminal charges were issued against petitioner after the "no bill" was returned in January 1988. However, a captain of police in Clifton, who was unhappy with the failure of the grand jury to return an indictment against petitioner, persisted in making statements that disturbed petitioner and caused him to fear the possibility of renewed or additional charges. Nothing ever came of those

fears or the police captain's unhappiness, and the officer was removed from his position.

The attorney performed other services collaterally connected to the above events, and those services continued into 1989. Most of these services revolved around the LePrince defense, and did not involve any charges against Mr. Pierson. Some of these services also included consultations relating to the possibility of future administrative proceedings against the petitioner, in connection with his employment.

The attorney requested, and petitioner paid him, an additional $10,000 in legal fees on September 8, 1988.

The Clifton Board of Education refused to reimburse this $10,000 to the petitioner, claiming that the statute providing for such reimbursement was not complied with.

Petitioner did not submit an itemized bill from his attorney, or any bill, in connection with the $10,000 reimbursement request in September 1988, even though he was asked to do so by the Board. Petitioner's attorney did not render a bill for his legal services, since this is a practice he never engages in. He only makes oral requests for payments. Additionally, the attorney has no notes, memoranda or other records of the specific services rendered that might be used to support an itemized bill.

LEGAL DISCUSSION AND CONCLUSIONS

> Indemnity of officers and employees in certain criminal actions.
>
> Should any criminal action be instituted against any such person for any such act or omission and should such proceeding be dismissed or result in a final disposition in favor of such person, the board of education shall reimburse him for the cost of defending such proceeding, including reasonable counsel fees and expenses of the original hearing or trial and all appeals.
> *N.J.S.A.* 18A:16-6.1.

The words "any such person for any such act or omission" in the above statute refers to the more fully defined provisions of *N.J.S.A.* 18A.16-6, which deals with the

indemnity of officers and employees against civil actions. The employees, acts or omissions in that statute are defined as "any person holding any office, position or employment under the jurisdiction of any board of education, . . . for any act or omission arising out of and in the course of the performance of the duties of such office, position, employment. . . ."

It is uncontested that the criminal action instituted against the petitioner fell within the purview of the statute, *N.J.S.A.* 18A:16-6.1.

The Board claims that it fulfilled its obligations of reimbursement when it paid petitioner for all legal fees he incurred in the defense of the criminal charges, up to and including the favorable grand jury action resulting in a "no bill," and that any legal fees paid for subsequent services no longer involved the defense of any pending or actual criminal action.

Additionally, respondent claims that it was impossible for the Board to determine if any of the counsel fees were reasonable, because of petitioner's failure to provide documentation that might enable the Board to make such a judgment.

While there is no specific statute or rule plainly indicating that a criminal complaint is definitely dismissed or an acquittal entered following a "no bill" or failure of a grand jury to return an indictment, the criminal defense is considered to be successfully terminated at that point.

> A grand jury which investigates a charge against a person and as a result does not return an indictment against the person, at the request of the person and upon the approval of the court which summoned the grand jury, shall issue to that person a report or statement indicating that a charge against the person was investigated and that the grand jury did not from the evidence presented return an indictment. The report or statement shall be issued upon completion of the investigation of the suspected criminal conduct, or series of related suspected criminal conduct, but not beyond the end of the grand jury's term.
> *N.J.S.A.* 2A:73B-2a.

Additionally, if a person is called before a grand jury for a purpose other than to investigate a charge against that person, he or she may request a statement indicating that he or she was called only as a witness to an investigation which did not involve a charge against the person. *N.J.S.A.* 2A:73B-2b.

> No person shall be held to answer for a criminal offense, unless on the presentment or indictment of the grand jury, except in cases of impeachment, or in cases now prosecuted without indictment, or arising in the army or navy or in the militia, when in actual service in time or war or public danger.
> *N.J. Constitution,* Art. 1, §8.

CONCLUSIONS

It is **CONCLUDED** that the Board's position is correct in both of its assertions. The defense against the criminal charges was successfully concluded in January 1988 when the grand jury returned its no bill. Approximately two months later, at the end of March 1988, the attorney requested an additional payment for services rendered. The full amount expended for legal fees up to that point, $15,000, was approved and reimbursed to the petitioner. The additional $10,000 fee payment was not requested by the attorney until September, six months after the March 1988 payment. That $10,000 was for services rendered from March through September. Such services did not involve the defense of any pending criminal charges against the petitioner. Instead, the services were primarily rendered in connection with Mr. Pierson's appearance as a witness before the LePrince grand jury, concerns over whether the LePrince defense counsel and others might have access to the earlier grand jury transcripts, and discussion of possible administrative actions (not criminal) against the petitioner's employment.

The statute is specific. It does not include reimbursement of legal fees because of fear, anxiety or apprehension about possible criminal charges that have not yet been instituted, or for being a witness in a grand jury proceeding against another. The statute refers to the cost of defending against criminal action that has been instituted. No criminal action was instituted or pending against petitioner when the attorney rendered the services for which he charged the $10,000.

The statute also provides that criminal defense reimbursement to an employee shall include reasonable counsel fees. The Board was not given any information by the petitioner or his attorney that might enable it to make a determination of reasonableness, and the attorney steadfastly holds to his position that he did not and does not bill or itemize for services rendered. The absence of any such billing or itemization is unreasonable in and of itself, which supports a finding by the Board that it was not presented with a counsel fee that it could possibly find to be

reasonable. The Board's largess is noted with respect to the first $15,000 requested and paid. While that is not in issue, even there the Board might have declined to reimburse for the same reason.

Therefore, it is ultimately **CONCLUDED** that the petitioner has failed to prove, by a preponderance of the credible evidence, that he is entitled to the $10,000 reimbursement sought. His request is not in compliance with requirements of the statute, *N.J.S.A.* 18A:16-6.1.

ORDER

It is therefore **ORDERED** that respondent's action, declining to reimburse the subject $10,000 paid by petitioner to his attorney in legal fees, pursuant to *N.J.S.A.* 18A:16-6.1, be **AFFIRMED** and the petition **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

February 2, 1990
Date

ARNOLD SAMUELS, ALJ

Receipt Acknowledged:

2/2/90
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

Feb. 2, 1990
Date

OFFICE OF ADMINISTRATIVE LAW

ms/e

GEORGE C. PIERSON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Timely exceptions were filed by petitioner and replies thereto by respondent.

Petitioner initially excepts to the ALJ's finding that no criminal action was pending against him when he paid the disputed $10,000 fee to his attorney in September 1988, such action having been concluded with the "no bill" handed down by the Grand Jury on February 10, 1988. Instead, petitioner argues,

> It is convincingly clear from the unrebutted testimony of Mr. Feinstein that this matter did not cease on February 10***. In this case, a school administrator conscientiously performing his duties was drawn into a criminal matter because of the politics of the situation. Petitioner was accused of hindering a police investigation by not immediately reporting an allegation of child abuse. The Passaic County Grand Jury heard the evidence against petitioner and determined that there were not grounds to indict him.
>
> A police officer in the City of Clifton was not satisfied with the decision of the Grand Jury and attempted to resurrect the charge in other legal forums and in the press. Furthermore, the criminal proceedings against the alleged child abuser [were] ongoing simultaneously. In light of all circumstances at the time, Mr. Feinstein was continually representing petitioner.
>
> The crime that petitioner was charged with was directly and intricately related to the crime the former school psychologist was charged with.*** [I]t is an oversimplification on the part of the ALJ to state that there was no longer a criminal charge against petitioner the day the Grand Jury found a "no bill". Rather, the criminal defense for petitioner continued until the criminal proceedings against the former school psychologist concluded, which was November 1989.*** (Petitioner's Exceptions, at pp. 2-3)

Petitioner then excepts to the ALJ's determination that the attorney's fee in this matter was not reasonable, and in particular to his conclusion that lack of itemized billing is unreasonable in and of itself. In support, he relies upon arguments made in his prior brief on the merits. These arguments center on criteria established in Singer v. State, 95 N.J. 487 (1984), which include amount of time and labor spent by counsel, novelty and difficulty of issues presented, the attorney's customary fee, the attorney's experience and reputation, exclusion of other employment by the attorney and the undesirability of being associated with the cause. In applying these criteria to the case at hand, petitioner relies on his own testimony and that of Mr. Feinstein to claim that Mr. Feinstein is an attorney of outstanding reputation in the field of criminal law, and that he spent a "significant" amount of time on the case, including court and grand jury appearances, meetings with petitioner, preparation, meetings and/or telephone conversations with judges and attorneys, and endured a "constant barrage" from the press, all of which took time away from other clients and made the case "like an albatross around his neck"***. (Petitioner's Brief, at pp. 5-7)

Petitioner finally argues that another Singer consideration, equity, should require the Board to reimburse him in full. Petitioner holds that he did nothing wrong, yet was forced to spend $10,000 of his own money to exonerate himself with respect to charges arising from performance of his duties as Director of Special Services; moreover, the Board is better able to absorb this cost than he. Therefore, fairness dictates that the Commissioner should reject the initial decision of the ALJ and order the Board to reimburse petitioner consistent with the intent of N.J.S.A. 18A:16-6.1.

In reply, the Board relies largely on its prior submission (Letter Memorandum, December 26, 1989) in response to petitioner's brief. Therein, the Board argues that, despite petitioner's attempts to blur distinctions, petitioner's legal representation involved three discrete components: 1) defense of criminal charges of concealing evidence and hindering prosecution, ending on February 10, 1988 upon the Grand Jury's issuance of a "no bill" and for which petitioner was billed $5,000; 2) response to a local police official's challenge to the Grand Jury decision, opposition to release of transcripts in connection with the defense of former staff member LePrince, and petitioner's appearance before the Grand Jury to testify in that matter, all of which were concluded by April 1988 and for which petitioner was billed an additional $10,000; and 3) advice in connection with a routine subpoena for documents by the defense attorney for LePrince, which commenced in Summer 1988 and for which an additional $10,000 was billed to petitioner. By reimbursing petitioner for the $15,000 expended during the first two phases of his representation, the Board met its obligation under N.J.S.A. 18A:16-6.1, as the third phase was not related to defense of a criminal action. With respect to reasonableness and equity, the Board holds that the arguments set forth by petitioner (amount of time, undesirability, etc.) apply almost entirely to the first two phases of his representation, for which he was in fact reimbursed after independent counsel, although disturbed by its lack of itemization, found petitioner's $15,000 total charge to be within

the bounds of reason given the complexity of the case; that he brought forth no expert witness in this proceeding (his attorney having appeared as a fact witness) to support his contention that the final $10,000 fee was reasonable; and that he had been explicitly warned after his first reimbursement that the Board would not accept further bills without itemization. Finally, the Board notes the inappropriateness of petitioner's asking the Commissioner, through arguments that are largely fact-sensitive, to overturn the ALJ's findings of fact without providing a transcript of the testimony upon which those findings were based.

Upon careful review of this matter, the Commissioner determines that petitioner has not met his burden of proof in demonstrating his entitlement to the relief he seeks. In effect, petitioner asks the Commissioner to find that the disputed $10,000 is merely the remaining balance due on a body of services necessitated in their entirety by petitioner's defense against criminal charges arising from his school employment, and that $25,000 constitutes a reasonable total fee for these services. However, petitioner has provided no basis upon which the Commissioner can draw such conclusions. The ALJ, who heard the testimony and observed the witnesses, concluded that the $10,000 in dispute was for services rendered after March 1988. According to findings of fact which the Commissioner finds no reason to refute based on the record before him, which does not include transcripts of testimony, these services centered on access to transcripts of the earlier Grand Jury proceeding and a subpoena issued in connection with the LePrince defense, and on discussions of possible administrative action against petitioner's employment by the Board. While it might reasonably be argued that the school employee indemnification statutes as a totality (N.J.S.A. 18A:16-6 and 18A:16-6.1) could be construed to protect staff members from certain costs above and beyond those relating strictly to the actual defense of a criminal matter, the record in this case does not permit the Commissioner to know precisely what services were rendered and why, or the reasonableness of the fees charged for them. Moreover, at least some of the services covered by the disputed fee (those regarding possible administrative action against petitioner's employment on the part of the Board) are unquestionably outside the purview of statutory indemnification.

The law invoked by petitioner does not give him an absolute right to reimbursement of legal fees upon demand. Rather, in a proper effort to protect the public fisc, the purview of the law is limited to those costs which can be shown to be both pertinent and reasonable. Clearly, a party who cannot or will not supply any basis on which specific determinations could be made as to the eligibility of services rendered and the reasonableness of their cost has no basis for complaint if expenses submitted for reimbursement are declined, particularly where their pertinence under the plain language of the statute is open to question.

The Commissioner notes that the Board's behavior in this matter was clearly not an attempt to minimize petitioner's rights by construing applicable statute in the narrowest possible way. Indeed, when the reimbursement claim presented to the Board plainly arose from eligible expenses and only the question of reasonableness remained, the Board favored petitioner by not penalizing him for

employing an attorney who refused to submit itemized bills or any other information that would permit the Board to fully and properly determine whether fees charged were reasonable for specific services rendered. Further, the Board attorney's letter to petitioner denying reimbursement of the disputed $10,000 (Exhibit J-13) clearly demonstrates that the Board might have considered reimbursement of at least some of this fee, even though it represented charges for services not incurred as a specific and direct result of petitioner's defense against a criminal action, had an itemization been supplied as requested. Instead, petitioner's (and his attorney's) insistence on providing no records of hours spent or services rendered effectively made it impossible for the Board to pay the disputed bill and still meet its obligation to the public as embodied in the plain language of applicable statute.

Accordingly, the initial decision of the Office of Administrative Law is adopted as the final determination in this matter and the instant Petition of Appeal dismissed with prejudice.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

GEORGE C. PIERSON,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF CLIFTON, PASSAIC COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, March 16, 1990

For the Petitioner-Appellant, New Jersey Principals & Supervisors Association (Wayne J. Oppito, Esq., of Counsel)

For the Respondent-Respondent, Dines & English (Patrick C. English, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

July 5, 1990

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 3628-89
AGENCY DKT. NO. 141-5/89

BARRY M. SILBERSTEIN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,
Respondent.

Barry Silberstein, petitioner, pro se
Richard K. Sacks, Esq., for respondent

Record Closed: June 23, 1989 Decided: February 9, 1990

BEFORE **RICHARD J. MURPHY, ALJ:**

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Barry M. Silberstein (petitioner) seeks to resume his seat on the respondent Board of Education of the Township of Lakewood (Board) following his submission of a handwritten letter of resignation in the heat of a Board meeting on the school budget on April 24, 1989. Mr. Silberstein seeks to compel the Board to accept the withdrawal of his resignation and to enjoin it from filling his seat. A request for emergent relief was transmitted to the Office of Administrative Law for hearing as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. on May 17, and was denied after argument on June 2, 1989, because the petitioner failed to show that he would be irreparably harmed. Briefs were submitted by both parties and the record closed on June 23, 1989. The due date of this decision was extended until February 9, 1990,

due to a heavy backlog of other decisions stemming from a pending public utility case. I regret any inconvenience that this delay may have caused.

The issue to be resolved is whether the petitioner's letter of resignation was effective at the meeting of April 24, 1989, at which it was tendered and accepted by the Board Secretary, notwithstanding the absence of any formal vote by the Board to accept it. For the reasons set forth, summary decision is granted for the respondent Board.

FINDINGS OF FACT

The underlying facts are not in dispute, and the following introductory facts were set forth in the order of June 2, 1989, denying emergent relief:

> The respondent Board is a Type II Board, consisting of nine members who are elected and not appointed. See, N.J.S.A. 18A:12-11. Petitioner was elected to the Board, and at a meeting held on April 24, 1989, to discuss cuts in the school budget, submitted the following letter of resignation, which was accepted by the Board Secretary, read at the meeting, and noted in the minutes:
>
> > It is with deep personal regret that I must take this opportunity to tender my resignation as a member of the Lakewood Board of Education - effective immediately (P-1).

Although his handwritten letter of resignation was accepted on the record at the public meeting by the Board Secretary, the Board did not vote to formally (or informally) accept it. After submitting his resignation, the petitioner left the Board meeting.

Several days later, on May 1, 1989, Mr. Silberstein again wrote to the Board Secretary, James L. Riehman, withdrawing the letter of resignation, in light of the fact that the Board had not moved or voted to accept it. In his letter of withdrawal, petitioner Silberstein noted that "[t]he letter of resignation, written in haste and in the midst of the meeting, was the result of great personal pressure generated by the intensity and emotionalism of said meeting, during which extensive cuts were made to the education budget for the school year 1988-1990" (P-2). Silberstein reiterated his intent to withdraw his resignation in a letter hand-delivered to the Board on May 8, but the Board voted on that date to deny petitioner's request for withdrawal of his resignation (P-4). Although the petitioner attributes his resignation to the

heat and tumult of the April 24 meeting, he does not allege that he was the subject of any duress or undue influence by the respondent Board, or any of its employees or representatives. There is no dispute as to the above facts and I so **FIND.**

The respondent Board also produced certifications from Board members Evelyn Feigin and Allen Haller, which the petitioner has not directly controverted or disputed. Ms. Feigin, President to the Lakewood Board of Education, certifies the following:

> 1. I am currently President of the Lakewood Board of Education and in that capacity chaired the Board's meeting of April 24, 1989.
>
> 2. I have reviewed the regular business meeting minutes, and I find them to be accurate.
>
> 3. As can be seen from the minutes, Mr. Silberstein participated to a great extent in the decisions, and a review of the minutes indicates that he either moved or seconded 19 of the 28 minutes considered by the Board that evening with respect to the budget reduction.
>
> 4. I had an opportunity to speak with Mr. Silberstein at the conclusion of the meeting and asked him why he had submitted his resignation. Mr. Silbertein told me that he had considered this action the day before and felt it was something he had to do.
>
> 5. I would also like to call to the Court's attention that at approximately 11:15 p.m. on the night of April 24, 1989, Mr. Silberstein delivered to the Board Secretary and to me his handwritten resignation. He immediately thereafter removed himself and his nameplate from the table at which all Board members sat to conduct business. I thereafter read, publicly, Mr. Silberstein's resignation and directed that it be incorporated into the minutes of the Board of Education, which action is reflected on pages 26 and 27 of the the Board's minutes.
>
> 6. The Board acknowledged and accepted Mr. Silberstein's resignation which is also reflected in the duly approved minutes.
>
> 7. In addition, I would like to call the Court's attention to Mr. Silberstein's Petition wherein he suggests that the resignation ". . .was the direct result of great personal pressure generated by the intensity and emotional nature of said meeting, during which, extensive cuts were made to the education budget. . ." As I have indicated above, Mr. Silberstein directly participated in the decision making relating to the cuts. Further, in interviews given to Mr. Sam Christopher of the Ocean County Observer and to other local newspapers,

> Mr. Silberstein stated that the reason for his resignation was that ". . .board business is beginning to eat into my family and business obigations [sic]. I can't allow the board to jeopardize things more important - that is my family well being."
>
> 8. Subsequent to Mr. Silberstein's resignation, he had requested that the Board permit him to withdraw it, and this is certainly an acknowledgement by Mr. Silberstein that his resignation delivered to and accepted by the Board was a complete act. It is my belief that Mr. Silberstein's action was the result of much consideration prior to the meeting that evening and that the Board merely honored his request to resign. . . . [R-1; emphasis added]

Allan Haller, who was elected to the Board on April 4, 1989 provided the following certification, which the petitioner has not challenged or disputed:

> 1. I am a member of the Lakewood Board of Education and was elected to this position on Tuesday, April 4, 1989, as a result of the annual School Board election.
>
> 2. After the results of the voting were announced on the evening of April 4, 1989, Mr. Silberstein approached me and indicated to me that it was his intention to submit his resignation from the Board on Wednesday, April 5, 1989. Having just been elected to the Board, I did not give this statement too much consideration as I had not been involved in the school matters prior to this recent election.
>
> 3. The Lakewood Board of Education held its reorganization meeting on Wednesday, April 5, 1989, at which time I was sworn in, for my one-year unexpired term. At the conclusion of the meeting Mr. Silberstein again mentioned to me and other with whom I was speaking that he still intended to resign and would be submitting his resignation shortly.
>
> 4. My family and I were on vacation; therefore, I did not attend the Board meeting held on April 24, 1989, at which time Mr. Silberstein actually handed in his resignation.
>
> 5. I submit this Certification to inform the Court that, in my opinion, Mr. Silberstein's action was not caused by the emotion of the evening but rather was something that he thought about and discussed with myself and others at least 2 1/2 weeks before submitted his actual resignation . . . . [R-2; emphasis added]

In an unsworn statement of facts included in his brief of June 13, 1989, the Petitioner states that "the letter of resignation was submitted without prior forethought as witnessed by the official minutes of said meeting, wherein I was attempting to set a date for the policy committee which I chaired" (brief at 1). He does not contest with competent evidence the claim that he mentioned resignation to Ms. Feigin and Mr. Haller, and I **FIND** as a matter of fact, that he did so mention, but this fact is not relevant to the ultimate issue of whether his resignation was valid. Mr. Silberstein notes, and the Board does not dispute, that, although the letter of resignation was read in public by the Board President, no motion to accept that resignation was made or voted upon at the meeting of April 24, 1989. The Board subsequently denied a motion to allow petitioner to withdraw his resignation. The Petitioner also submits and the Board does not dispute that it had, on at least three prior occasions, voted to accept the resignation of former Board members. In these three prior cases, as set forth in the minutes offered by the Petitioner, motions to formally accept the resignations were made seconded and voted upon, prior to the positions being declared vacant and action being taken to fill the vacancies (P-5-7).

There is no dispute as to the above facts and I so **FIND**.

ISSUE

The issue is whether an elected member of a Type II School Board who submits a written resignation at a Board meeting which is read, publicly acknowledged, and included in the minutes by the Board President, but not moved or voted upon by the Board, membership may be held to have resigned from the Board pursuant to *N.J.S.A.* 18A:12-1 et seq.

DISCUSSION AND CONCLUSIONS

Both parties concede that the answer to this question is not expressly set forth in *N.J.S.A.* 18A:12-1 et seq., nor in the regulations adopted by the State Board of Education. See, *N.J.A.C.* 6:1-1 et seq.

Petitioner Silberstein argues that his resignation was not effective because it was not formally acted upon by the Board of Education through a vote of acceptance, in accordance with past practice of the Board. Mr. Silbertein contends that he rescinded his resignation without the Board having voted to accept it and that, as a matter of law, his seat was not vacated and he is eligible to resume his

position on the Board as a duly elected member. He cites no legal authority to support his argument, but argues that the Board is bound by its past practice of accepting (or rejecting) resignations by a vote of the full Board. He cites three other instances between 1984 and 1988 in which the Board entertained a motion to formally accept a resignation, which was seconded and then voted on prior to the position being declared vacant and action being taken to fill that declared vacancy.

The respondent Board does not dispute that it has, on prior occasions, voted to accept resignations by members, but argues that petitioner's resignation was effective when delivered in a public session to the Board Secretary and president and that a vacancy was created by that act. The respondent notes that *N.J.S.A.* 18A *et seq.* does not contain specific statutory language to determine when the office of Board of Education member becomes vacant, but it points to provisions of the New Jersey Municipal Law providing that elective and appointive offices are deemed vacant upon the filing of a written resignation See, *N.J.S.A.* 40A:9-12.1, 40A:16.3. It also argues that, since a Board member cannot be forced to serve in an elected position, that member can resign without a vote of the Board of Education, so long as that resignation is clearly communicated to and received by the Board. The Board argues that it is not bound, as a matter of law, by its prior practices and policies where no vested rights are involved, as is the case in school Board membership which is a privilege and not a vested rightsee, *Blessing v. Bd. of Ed. of Palisades Park,* 1974 *S.L.D.* 1133 at 1136. The respondent further contends that Mr. Silberstein has not demonstrated that he detrimentally relied upon the past practice in the district in voting to accept resignations, and offered his resignation with the intent that it be immediately effective. The Board notes an earlier Commissioner's decision in 1970 (in the case of *Fochi,* 1970 *S.L.D.* 279), where the Commissioner appeared to hold that a resignation by a member of the Board of Education was effective upon acceptance by the Board. Respondent here distinguishes the *Fochi* case as factually different in that there the Board specifically voted to refer the matter of the resignation for further study and to confer with the member who had resigned in order to determine his reasons. The Lakewood Board of Education also cites the following paragraph from Corpus Juris Secundum, which the Commissioner cited in the *Fochi* case:

> Acceptance. Resignations of school district officers are covered by the common-law rule that a public officer cannot resign his office without the consent of the body which appointed him or which has power to fill the vacancy. Accordingly, in order to be effective, the resignation of a school officer must be accepted by the proper authority. It is not necessary, however, for a resignation to become effective that there shall be a

> formal acceptance. Any conduct on the part of the officers charged with the duty of filling the vacancy, if one exists, indicating a purpose to accept it is sufficient, such as the appointment of a successor, or recognizing the existence of a vacancy, or in any other manner treating the resignation as operative. 78 CJS 881

I agree with the respondent Board's argument and **CONCLUDE**, substantially for the reasons set forth in the Board's memoranda of law, that the petitioner's letter of resignation was effective when it was submitted at a public meeting of the Board and accepted by the Board Secretary, even without a formal vote by the Board. Although such a formal vote would seem to be the wiser practice, there is no basis in the statute so far as I can tell to support the conclusion that such a vote is required in order for a resignation to be accepted. There is precedent not cited by either the petitioner or the respondent, that the office of school trustees, (under prior statutes,) is not vacated by an unaccepted resignation as in the case of *Townsend v. Trustees of the School District No. 12, Essex County,* 41 *N.J.L.* 312 (1879), where the court found that mere tender of an offer to resign does not vacate the school trustee's office without acceptance by the County Superintendent. In this case, the action of the Board Secretary in accepting the filing of petitioner's resignation at a public meeting, in the presence of the Board and in open session, was sufficient to make that resignation effective and I so **CONCLUDE.** The fact that petitioner may have hastily tendered his resignation in the emotional turmoil of a hotly disputed Board meeting concerning the budget does not, in it of itself, establish grounds to rescind that resignation for reasons of duress, or the stress of petitioner's mental condition. See, *e.g. Brunnquell v. Bd. of Ed. of the Scotch Plains-Fanwood Regional School District, et al,* Commissioner's decision of July 6, 1987. In any event, petitioner is not claiming duress (or incapacitating stress) but, rather, seeks to retrieve his resignation, which he had perhaps to hastily tendered.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

2-9-90
DATE

Richard J. Murphy
RICHARD J. MURPHY, ALJ

2/13/90
DATE

Receipt Acknowledged:

DEPARTMENT OF EDUCATION

FEB 14 1990
DATE

Mailed to Parties:

Jayne LaVecchia
OFFICE OF ADMINISTRATIVE LAW

ct

BARRY M. SILBERSTEIN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF LAKEWOOD, OCEAN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the instant matter, the Commissioner adopts the initial decision for the reasons stated by the ALJ below. In so deciding, the Commissioner notes with approval the Board's argument that in the case entitled John A. Fochi v. Board of Education of the Borough of Lodi, 1970 S.L.D. 279, the Commissioner's citation of a quotation from 78 C.J.S. Resignation Section 115 (1952) in determining that a Board must take formal action in accepting a resignation, omitted the following two sentences:

> It is not necessary, however, for a resignation to become effective that there shall be a formal acceptance. Any conduct on the part of the officers charged with the duty of filling the vacancy, if one exists, indicating a purpose to accept it is sufficient, such as the appointment of a successor, or recognizing the existence of a vacancy, or in any other manner treating the resignation as operative. (Id.)

These two sentences significantly affect the outcome of this case. The Board did acknowledge receipt of petitioner's resignation at the meeting of April 24, 1989 by the Board president's directive to the Board secretary to read the resignation into the official Board minutes, albeit that it did not formally vote to accept the resignation. In that a Board member cannot be compelled to serve, the Commissioner thus agrees with the ALJ's conclusion that so long as a resignation is clearly communicated to and received by a board of education, it is effective, even without a formal vote by the board and notwithstanding the board's past practices to the contrary. In so concluding, the Commissioner notes that to whatever extent this decision is inconsistent with Fochi, supra, that decision is hereby superseded.

Accordingly, for the reasons expressed by the ALJ as supplemented herein, the Petition of Appeal is dismissed, with prejudice.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
DISMISSING CONTESTED CASE
OAL DKT. NO. EDU 6872-89
AGENCY DKT. NO. 266-8/89

SOUTHAMPTON BOARD OF EDUCATION,
Petitioner,
v.
CARASTELLAR PETERSON,
Respondent.

David Serlin, Esq., for petitioner

Joel S. Selikoff, Esq., for respondent (Selikoff & Cohen, attorneys)

Record Closed: January 17, 1990 Decided: February 7, 1990

BEFORE JEFF S. MASIN, ALJ:

This matter came before the Office of Administrative Law following transmittal from the Department of Education as a contested case, pursuant to *N.J.S.A. 52:14F-1 et seq.* The petitioner Board of Education had certified tenure charges against the respondent. Specifically, the written charge submitted to the Commissioner was that Ms. Peterson, a member of the teaching staff in petitioner's district, had been convicted of shoplifting in violation of *18 U.S.C. §13* in the United States District Court from the District of New Jersey on February 10, 1989 and that such conviction was analogous to shoplifting under the New Jersey statute, *N.J.S.A. 2C:20-11.*

According to the charge, as a result of the conviction Peterson was ordered to pay a $400 fine. The Board asserted that *N.J.S.A. 2C:51-2a(1)* provided that a person holding any public employment who was convicted of an offense involving dishonesty "shall forfeit such position." In view of its conclusion that shoplifting was an offense involving dishonesty, the Board contended that the charge against Ms. Peterson under the tenure statute was sufficient to warrant dismissal.

Following transmittal to the OAL a prehearing conference was held. A hearing on the matter was delayed pending attempts by Ms. Peterson's attorney to obtain waivers of the forfeiture from the Burlington County Prosecutor and the New Jersey Attorney General. Such attempts were unsuccessful. The petitioner then filed a motion for summary decision. Upon review of the record and the relevant statutes, the administrative law judge concluded that, for the reasons expressed below, the contested case should be dismissed because the effect of the forfeiture statute removed Ms. Peterson from her position automatically and therefore there was no need for the Board of Education to take any action under the tenure statute to remove her. As such, there is no relief which the Commissioner can grant, nor is there any which he need grant, to effectuate the removal of Ms. Peterson from her teaching position with the petitioner Board of Education.

N.J.S.A. 2C:51-2 provides that:

> a. A person holding any public office, position, or employment elected or appointive, under the government of this State or any agency or political subdivision thereof, who was convicted of an offense shall forfeit such office or position if:
>
> (1) He is convicted under the laws of this State of an offense involving dishonesty or a crime of the third degree or above or under the laws of another state or of the United States of an offense or a crime which, if committed in this State, would be such an offense or a crime;
>
> . . .
>
> b. The forfeiture set forth in subsection a. shall take effect:
>
> (1) Upon finding of guilt by the trier of fact or a plea of guilty, if the court so orders: or
>
> (2) Upon sentencing unless the court for good cause shown, orders a stay of such forfeiture. . . .
>
> c. In addition to the punishment prescribed for the offense, and the forfeiture set forth in 2C:51-2a., any person

> convicted of an offense involving or touching on his public office, position or employment shall be forever disqualified from holding any office or position of honor, trust or profit under this State or any of its administrative or political subdivisions.

N.J.S.A. 2C:51-2d provides for a waiver of forfeiture in certain circumstances. As noted, the county prosecutor and attorney general have refused a waiver for Ms. Peterson.

N.J.S.A. 18A:6-10 provides:

> No person shall be dismissed or reduced in compensation,
>
> (a) If he is or shall be under tenure of office, position or employment during good behavior and efficiency in the public school system in the state, or
>
> (b) . . .
>
> except for inefficiency, incapacity, unbecoming conduct, or other just cause, and then only after hearing held pursuant to this subarticle, ...

Based upon the undisputed facts which are established in the briefs submitted by counsel on the motion for summary decision, I **FIND** that Ms. Peterson was convicted in the Federal District Court of shoplifting and was sentenced by the United States Magistrate Joel B. Rosen on January 31, 1989 on conviction of shoplifting, in violation of *18 U.S.C. §13*, assimilating *N.J.S.A. 2C:20-11*, and was fined the sum of $400, with payment to be made by June 1, 1989. Further, I **FIND** that the offense of shoplifting is indisputably one of dishonesty, involving the knowing and willful attempt to remove from a place of business an item offered for sale without paying for such or intending to do so. In view of Ms. Peterson's conviction she cannot at this point assert that she was not guilty of the offense charged. Under these circumstances, I **FIND** that she in fact was both convicted and sentenced for this offense involving dishonesty.

In view of the preliminary findings set forth above, which are necessary in order to determine whether or not this case should proceed with respect to both the motion for summary decision and any subsequent hearing, I **CONCLUDE** that the above-cited forfeiture statute automatically worked a forfeiture upon Ms. Peterson's position as a public employee of the school board and therefore as of the time of her sentence she ceased to be employed by the Board. This forfeiture superseded her rights under the tenure statute such that the protections of that

statute do not apply to her removal from her teaching position. Since the forfeiture was automatic and since it has not been waived by the appropriate authorities, there is no need for the school board to resort to tenure charges as a means of removing Ms. Peterson. In effect, as of the time of her conviction the Board merely needed to remove her from its employee roles and cease paying her. It did not need to invoke any assistance from the Commissioner to effectuate such removal.

In view of the above conclusions, I **CONCLUDE** that there is no basis for any action by the Commissioner in this case. Any such action which might purport to remove Ms. Peterson would be superfluous, as she has already been removed by reason of law. Therefore, there being no relief which can be granted, I **CONCLUDED** that the contested case must be **DISMISSED**. It is so **ORDERED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A. 52:14B-10(c).*

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

February 7, 1990
Date

JEFF S. MASIN, ALJ

Receipt Acknowledged:

2/9/90
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 9 1990
Date

OFFICE OF ADMINISTRATIVE LAW

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IN THE MATTER OF THE TENURE	:	
HEARING OF CARASTELLAR PETERSON,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE TOWN-	:	DECISION
SHIP OF SOUTHAMPTON, BURLINGTON	:	
COUNTY.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

After careful consideration, the Commissioner fully concurs with the ALJ's findings that respondent's conviction for shoplifting under Title 18 U.S.C. Section 13 was analogous to a conviction for shoplifting under N.J.S.A. 2C:20-11, that her offense involved dishonesty and therefore resulted in forfeiture of her teaching position upon sentencing under N.J.S.A. 2C:51-2b(2), and that a subsequent attempt to apply to the trial court for a waiver of forfeiture under N.J.S.A. 2C:51-2d was unsuccessful. This being the case, the Commissioner must concur with the ALJ that respondent has lost her entitlement to both her teaching position and the procedural protections of tenure, so that the Board need not have certified tenure charges to effect her removal.

In so determining, the Commissioner further relies upon a prior decision wherein he found that the rights of a tenured school janitor were not violated by the Board's having dismissed him solely by reason of his conviction for shoplifting. In that decision, the Commissioner held that the language of N.J.S.A. 2C:51-2 is clear on its face and that there is no question but that shoplifting is a crime involving dishonesty, an automatic grounds for forfeiture. Isadore Timmons v. Board of Education of the Borough of Paramus, Bergen County, decided by the Commissioner July 23, 1986, aff'd State Board December 3, 1986, aff'd N.J. Superior Court November 13, 1987

Accordingly, for the reasons stated by the ALJ, together with the additional precedent noted above, the decision of the Office of Administrative Law dismissing the instant tenure proceeding is adopted as the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6387-88
AGENCY DKT. NO. 177-6/88

THOMAS FOUSTY,
Petitioner,
v.
SOUTH PLAINFIELD BOROUGH BOARD OF EDUCATION,
Respondent.

Arnold M. Melik, Esq., for petitioner, **Karen L. Cayci**, Esq., on the letter in lieu of Brief (Wills, O'Neill & Melik, attorneys)

Robert J. Cirafesi, Esq., for respondent, **Dakar R. Ross**, Esq., on the letter in lieu of Brief (Wilentz, Goldman & Spitzer, attorneys)

Record Closed: December 27, 1989 Decided: February 13, 1990

BEFORE **DANIEL B. MC KEOWN**, ALJ:

INTRODUCTION

Thomas Fousty (petitioner) was formally employed by the South Plainfield Board of Education (Board) as a teacher of history for the 1986-87 and 1987-88 academic years. Petitioner alleges in a Petition of Appeal filed to the Commissioner of Education that the determination of the Board not to renew his employment of the 1988-89 academic year was made in retaliation for his having asserted statutory, though nonspecific, rights to the position of head football coach and, as such, renders his non-renewal of employment as a teacher an arbitrary and capricious act of the Board. Petitioner seeks reinstatement as a teacher to the employ of the Board and he seeks an Order by which the Board would be compelled to appoint him to the position of head football coach.

After the Commissioner transferred the matter on August 29, 1988 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F- 1 et seq., a telephone prehearing was conducted November 17, 1988 during which the issues were determined and the parties stated their belief the matter was to be settled. Nevertheless, it was agreed to schedule a hearing for March 23, 1989 in the event settlement efforts failed.

Subsequent to the prehearing conference then counsel for petitioner was substituted for present counsel of record and prior to the scheduled hearing date counsel for the Board sought an adjournment of the hearing, successfully it is noted, because of a New Jersey tax court imposed calendar conflict which required his attendance elsewhere. The matter was rescheduled for hearing September 12, 1989 but this date was also adjourned upon the good faith belief of the parties the matter was to be amicably adjusted or, alternatively, that all relevant facts and documents would be jointly stipulated so that the matter could be decided on cross-motions for summary decision. The good faith belief of settlement did not reach fruition; the issues were submitted for summary decision on the record.

The record consists of the pleadings, stipulated facts and stipulated documents, as well as letter memoranda of the parties submitted in support of their respective positions. Findings are reached in this initial decision that petitioner failed in his proofs that the Board unlawfully retaliated against him regarding re-employment and that he failed in his proofs to show the Board elected not to reemploy him in violation of any constitutional or legislatively conferred rights. The conclusion is reached that the Petition fails to state a cause of action with the result that summary decision on the merits must be entered on behalf of the Board.

STIPULATION OF FACT

The stipulation of fact signed by the parties and filed here December 26, 1989 is reproduced here in full:

> It is hereby stipulated and agreed as the material facts with respect to this matter:
> For the school years 1986 to 1988, Thomas Fousty ("petitioner") was employed by the South Plainfield Board of Education ("Board") as a nontenured but certified history teacher.
>
> On or about January 27, 1988, the Board duly posted a notification of vacancies for various Fall High School coaching positions, including the positions of head varsity

football coach and assistants. On January 29, 1988, petitioner applied for the position of Head Varsity Football coach of South Plainfield High School. At that time, petitioner was the only certified teacher who applied from within the district. Petitioner's name was also submitted for the position of assistant coach upon the recommendation of the Athletic Director of South Plainfield High School.

At its regular meeting on March 15, 1988, the Board, upon recommendation of the Superintendent, approved the appointment of petitioner as an assistant football coach. At said meeting, no action was taken by the Board with respect to the appointment of a head football coach.

In March, 1988, the Assistant High School Principal prepared for review by the Principal the annual teacher evaluation of petitioner's performance and progress. Based upon this review, petitioner was recommended for reappointment with an overall teacher rating of "2". In or about March, 1988, petitioner and petitioner's Collective Bargaining Representative informed the Athletic Director and the High School Principal that petitioner intended to pursue all statutory rights to the position of head football coach. On April 25, 1988, the High School Principal reversed his prior recommendation and recommended to the Assistant Superintendent that petitioner not be re-hired "based on two consecutive yearly evaluations with an overall rating of 2." The evaluation form used by respondent was a scale of "1 to 3".

At a special public meeting on April 27, 1988, the Board, upon the recommendation of the Superintendent of Schools, approved the nonrenewal of petitioner's contract of employment. On April 28, 1988, the Board advised petitioner of its decision not to renew petitioner's contact. On May 3, 1988, the Board, pursuant to petitioner's request, advised petitioner in writing of the High School Principal's recommendation and the reasons therefore.

On or about May 10, 1988, James P. Griffin, a certified social studies teacher and assistant football coach for the preceding seven years at Monroe Township High School, applied for both a teaching and coaching position at South Plainfield High School. On May 12, 1988, the High School Principal recommended to the Board that Mr. Griffin be appointed to the positions of Social Studies teacher and Head Football Coach. At its regular meeting on May 17, 1988, the Board, upon the recommendation of the Superintendent of Schools, approved the appointment of Mr. Griffin to the positions of Social Studies teacher, Head football coach and summer weight program supervisor effective the 1988-89 school year.

In addition to the foregoing stipulated facts, the parties also stipulated into evidence 16 separate documents. A review of the stipulated documents reveals a

chronology of petitioner's employment with the Board which comports with the foregoing stipulated facts. The documentary chronology follows.

1. There is in effect in the South Plainfield Schools a staff evaluation policy (J-1) which provides in part as follows:

6. The March evaluation will include a Total Performance Evaluation which summarizes the total performance of a nontenure staff member. Recommendations for re-employment and increments are made on this form. Reports will be signed by the teacher and supervisor/administrator ***

7. A nontenure teacher in the first year of contract must have a minimum Total Performance Evaluation of two (2) in order to be considered for renewal for contract. A teacher being recommended for tenure must have Total Performance Evaluation of one (1) to be considered for renewal of contract. Any nontenure teacher who is considered "doubtful" or "marginal" is to be reported forthwith in writing on the teacher evaluation form by the building principal to the Assistant Superintendent of Schools. The specific weaknesses will be noted, together with supervisory efforts designed to be of assistance in correcting deficiencies. Any nontenure teacher still considered doubtful after unsuccessful remediation efforts will not be recommended for renewal of contract.

The policy has attached to it various forms including a job description for the position of teacher, a teacher observation form to be completed by the observer, a teacher evaluation instrument which sets forth standards upon which the teacher's performance is to evaluated, a report of teacher evaluation which is to completed by the evaluator according to the standards of the teacher evaluation instrument, a total performance evaluation/professional improvement plan to be completed by the evaluator and the affected teacher, and a staff evaluation/professional improvement plan form document to be completed by the evaluator and affected staff member.

2. During petitioner's first year of employment as a teacher, 1986-87, his performance was observed by a supervisor in January and March 1987. In both written reports of the observations the supervisor noted petitioner's strength and areas needing improvements, as well as affording petitioner specific suggestions for improvement. During March 1987 the assistant principal prepared a Total Performance Evaluation/Performance Improvement Plan in which he rated petitioner's performance a "2" which is defined on the document as "One who is meeting the job responsibilities but might enhance total effectiveness by responding to the suggestions itemized on the attached evaluation sheet." The supervisor recommended petitioner for continued employment with a salary increment for 1987-88. The document is signed by the

supervisor as the one who prepared the document. Petitioner and the principal signed the document under the legend 'I have read this report.' (See J-2).

3. During petitioner's second year of employment as a teacher, 1987-88, his performance was observed in September and December 1987 and January and February 1988. Once again, the supervisor noted petitioner's strengths and areas needing improvement, as well as affording petitioner's specific suggestions for improvement. During March 1988 the assistant principal prepared a Total Performance Evaluation/Professional Improvement Plan in which he rated petitioner's performance "2." The assistant principal recommended petitioner be reappointed for the 1988-89 year together with being awarded a salary increment. This document is signed by the assistant principal, and by the principal and petitioner signifying only that the document was read by them. (J-3).

4. A review of the observations and evaluations prepared by the supervisor/assistant principal during petitioner's employ reveals they perceived petitioner's instruction, subject competency, and professional growth as areas in need of some improvement.

5. Petitioner did apply on January 29, 1988 for the position of head coach for football for the 1988-89 season. At a meeting held March 15, 1988 the Board approved the superintendent's recommendation to appoint petitioner to the position of assistant football coach. The Board deferred action on the appointment of a head coach for football. (J-4, J-5, J-6, J-7)

6. After petitioner was advised on April 21, 1988 that the Board intended to discuss in private session on April 25, 1988 his employment for 1988-89, petitioner elected to have the meeting conducted privately. (J-9, J-10). It is presumed absent evidence to the contrary that such a meeting was conducted.

7. On April 25, 1988, the date petitioner attended the private Board meeting regarding his continued employment, the high school principal made written recommendations to the assistant superintendent regarding high school staff for 1988- 89. (J-10) It appears from that memorandum that the principal recommended the reduction of two teachers in the English department, a reduction of a part-time teacher in the foreign language department, a reduction of one teacher in the mathematics department, a reduction of one teacher in the physical education department, a reduction of one teacher in the science department and the principal stated "I am not recommending [petitioner] for re-hiring based on two consecutive yearly evaluations with an overall rating of 'two'." (J-10)

8. At the special meeting held by the Board April 27, 1988 it determined not to reemploy 14 other nontenure teachers, including petitioner for 1988-89.

9. Petitioner requested the reasons in writing from the Board why it determined not to continue his employment. On May 3, 1988 the assistant superintendent advised him he was not reemployed "*** based on two consecutively yearly evaluation with an overall rating of a '2'." (J-14)

10. Thereafter, on May 12, 1988 the high school principal recommended the employment of a teacher outside the district to be employed by the Board as a teacher of social studies and as the head football coach. That recommendation was adopted by the Board at a meeting held May 17, 1988. (J-16)

LEGAL ARGUMENTS

I

Petitioner argues that the stipulated facts and documents show that as of March 1988 "*** he was performing effectively and under the guidelines set forth by the [Board and that he] should clearly have been reappointed." (Letter memorandum, p.2) Petitioner notes that the Board admits in the pleadings other nontenure teachers with two consecutive year-end evaluation ratings of "2" have been reappointed by the Board. Petitioner maintains such an admission by the Board results in the inescapable conclusion the Board did not continue his employment to retaliate because he, along with his representative, advised the principal he intended to pursue all statutory rights to the position of head football coach.

Petitioner asserts that the facts in this case show the high school principal, upon being told that he intended to pursue his statutory rights to the position of head football coach, reversed his prior recommendation to the assistant superintendent to continue his employment and, instead, in retaliation against him recommended he not be reemployed on the basis of the two consecutive year-end ratings of "2."

Petitioner maintains that it is well established a public employee may not be denied renewal of an employment contract due to the exercise by that employee of a constitutionally protected right and cites Katz v. Bd. of Trustees, Gloucester Cty. Col., 125 N.J. Super 248 (App. Div. 1973). Finally, petitioner contends that because he was the only certified and qualified applicant for the position of head football coach at the time of his application, and in light of his argument he is entitled to reinstatement as a

teacher in the Board's employ, he is also entitled to an Order by which he would be appointed head football coach.

II

The Board argues that its decision with respect to the employment of its non-tenure teaching staff rests solely with it and absent a showing of an abuse of its discretionary authority, its action must be affirmed. The Board cites a series of cases which stand for the proposition that it alone has the authority to select its teachers and that it alone has an almost complete right to terminate the services of a teacher who has no tenure and whom it regards as undesirable. (See, e.g. Dore v. Bedminister Twp. Board of Ed., 185 N.J. Super 447 (App. Div. 1982)).

The Board demands summary decision on the merits of this case through the asserted failure of the petitioner to offer any substantive proof that its action regarding his employment nonrenewal was arbitrary, capricious or unreasonable or in violation of any constitutional or statutorily protected rights.

ANALYSIS

It must be recognized that nontenured teachers enjoy no guarantee or affirmative right of continued employment with an employing board of education from one academic year to the next. Donaldson v. Bd. of Ed. of North Wildwood, 65 N.J. 236, 246 (1974). With the exception of constitutional and statutory proscriptions, a board has complete discretion to determine whether to continue the employment of its nontenured teachers. Dore Supra. The New Jersey State Board of Education, relying upon Dore, held that a nontenure teacher is entitled to litigate a non- reemployment decision only if the facts he alleges if true, would constitute a violation of constitutional or legislatively conferred rights. Guerriero v. Board of Ed. of Borough of Glen Rock, 1986 S.L.D. -, (Feb. 7, 1986). An appeal to the Commissioner under N.J.S.A. 18A:6-9 regarding non-reemployment of nontenure teachers is, in its scope, very limited and not at all concerned whether the affected person "is a good teacher by objective criteria." Id.

Petitioner does not allege race, religion or any other kind of unlawful discrimination influenced the Board's failure to reappoint him. Petitioner does not claim that the Board failed to comply with that process due a nontenure teacher whose employment has not been continued as is set forth at N.J.S.A. 18A:27-3.1 et seq. Petitioner's claim is anchored upon asserted retaliation by the principal because of his

announced intention to pursue unidentified statutory rights to the position of head football coach.

Nowhere in petitioner's pleading or argument does he identify 'statutory rights to the position of head football coach' to which he makes claim nor can the basis for such asserted rights be discerned from the record. It has already been established that a nontenure teacher has no legally enforceable right to continued employment. It is also established under school law that a teaching staff member does not have a legally enforceable right to be appointed to a position of coach. Koslick v. Edison Twp. Bd. of Ed., 1987 S.L.D. . . . , State Board of Ed. (April 3, 1987). N.J.A.C. 6:29-6.3 obligates boards of education to advertise vacancies in its coaching positions and to appoint individuals who possess any New Jersey certificate to teach issued by the Board of Examiners. Other than these two restrictions, boards of education are free within constitutional or statutory proscription to appoint anyone or no one to existing vacancies.

Petitioner does not contend he was prohibited by the principal from filing a grievance under an existing Agreement to challenge the Board's failure to appoint him head coach nor does he complain the principal some how prohibited him from filing any challenge in any forum of competent jurisdiction regarding the Board's failure to appoint him head coach. Petitioner's claim of retaliation is understood to mean he says but for his declaration to the principal, the principal would have recommended him for reemployment, the principal's administrative superiors would have endorsed that recommendation, and the Board would have adopted their administrator's recommendation for reemployment and petitioner would then have been reemployed.

The facts in this case in light of the relevant law fail to show the cause--effect relationships petitioner advances in his claim. The purely speculative nature of the claimed result of reemployment in 1988-89 but for his declaration to the principal is a claim which stands of frail reeds. It matters not that other nontenure teachers with two consecutive year-end evaluations of "2" may have been reappointed and petitioner was not reappointed with similar year-end evaluations. Whether to renew the employment of any nontenure teacher is uniquely within the discretion of the Board and such discretion is not limited by artificial standards sought to be imposed through this argument.

The principal's signature affixed to the March 1988 Total Performance Evaluation/Professional Improvement Plan, in which the assistant principal recommended petitioner's reappointment, signifies nothing other than what the notation above the

principal's signature states: "I have read this report." While it is recognized petitioner is of the view that by affixing his signature the principal recommended his reappointment, the Board is equally adamant that petitioner's recommendation for reappointment was only that of the assistant principal.

Even if petitioner is correct in his interpretation of the stipulated facts and documents that the principal through his signature on the March 1988 Total Performance Report joined in the assistant principal's recommendation of reappointment, the principal's subsequent comprehensive memorandum to the assistant superintendent on April 25, 1988 regarding the 1988-89 staffing needs of the high school in the face of declining pupil enrollment shows that the principal made a reasoned, though negative, judgment regarding petitioner's potential to contribute towards desirable levels of instruction for pupils in South Plainfield. That is not to say that petitioner is not a "good" teacher; rather, the facts show only that the South Plainfield school authorities determined not to continue petitioner's employment towards tenure as a teaching staff member. The Board is under no obligation to prove the truth of its underlying reason for such action; rather, petitioner has the burden to show the action is unlawful or an abuse of discretion.

Moreover, even if petitioner's announced declaration to the principal regarding the head coach assignment was an element of the principal's negative recommendation for continued employment, that circumstance would not constitute a cause of action against the Board. Petitioner, as a nontenured teacher, has no enforceable right to continued employment as a teacher, nor does he have an enforceable right to be appointed head coach. There is no evidence that the Board failed to honor each and every term of petitioner's 1987-88 employment contract.

Finally, even if the principal had by his signature joined in the recommendation to continue petitioner's employment into 1988-89 and thereafter, the principal discovered the availability of, in his view, a more qualified individual to fill a teaching vacancy, or even to replace an existing nontenure teacher when that teacher's contract expires, while simultaneously being a desirable candidate for the head coach position of the football team, petitioner has no cause of action. An enforceable contract is not created between the parties merely through a school principal recommending future action to be taken by a board regarding the continued employment of a nontenure teacher.

Having considered the record as a whole in light of the arguments advanced by the parties, I **FIND** petitioner failed in his proofs to show that the South Plainfield Board of Education unlawfully retaliated against him regarding non-reemployment for 1988-89 and

I **FIND** that petitioner failed to show the Board unlawfully retaliated against him for any reason. I **CONCLUDE** that based on the record as a whole the petitioner failed in his proofs to show the Board violated any identifiable constitutional or legislatively conferred rights he may enjoy. I **CONCLUDE** petitioner's proofs fail to state a cause of action and I finally **CONCLUDE** that summary decision on the merits must be and is entered on behalf of the South Plainfield Board of Education.

The Petition of Appeal is dismissed.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

January 1, 1990
DATE

DANIEL B. MC KEOWN, ALJ

Agency Receipt:

Feb. 13, 1990
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

JAN 23 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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THOMAS FOUSTY,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF SOUTH PLAINFIELD, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon review of the record the Commissioner concurs with the findings and conclusion of the Administrative Law Judge and adopts the initial decision as the final decision in the matter for the reasons well stated therein.

Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6379-87
AGENCY DKT. NO. 265-8/87

BOARD OF EDUCATION OF THE BURLINGTON COUNTY SPECIAL SERVICES SCHOOL DISTRICT,
Petitioner,
v.
DEPARTMENT OF EDUCATION,
Respondent.

Thomas S. Harty, Esq., for petitioner (Parker, McCay & Criscuolo, attorneys)
Nancy Kaplen Miller, Deputy Attorney General, for respondent (Robert J. DelTufo, Attorney General of New Jersey, attorney)

Record Closed: April 24, 1989 Decided: February 14, 1990

BEFORE **RICHARD J. MURPHY**, ALJ:

STATEMENT OF THE CASE AND PROCEDURAL HISTORY

Petitioner, Board of Education of the Burlington County Special Services School District (District), alleges that the action of the State Department of Education in declaring an audit exception of $664,808 in its state aid reimbursement is arbitrary and discriminatory. On November 22, 1988, I issued an Order for Partial Summary Decision (attached) resolving all but one of the issues in this case, and that Order was adopted by the Commissioner of Education on January 10, 1989 and is currently pending on appeal before the New Jersey Superior Court, Appellate Division. The attached Order amply sets forth the earlier Procedural History of this matter, as well as the pertinent Findings of Fact. After the Partial Summary Decision Order was issued, the parties were requested to submit a precise computation of the amount of

state aid owed, and the respondent Department of Education submitted the computation set forth below, with which the petitioner disagrees. The record on this last aspect of the case closed on April 24, 1989, and the due date for submissions in this opinion was extended until February 14, 1990, because of a heavy backlog of overdue opinions stemming from a pending public utility case. I regret any inconvenience that this delay may have caused, but note that the matter has been pending on appeal in the interim.

ISSUE

The only issue to be resolved is whether the Department has submitted an appropriate computation of the $664,808.60 in state aid which it seeks to compel the District to repay to the State.

FINDINGS OF FACT

The following information has been provided by the Department of Education, reflecting its precise computation of the amount claimed to be owed:

Year	Required to be Capital Outlay	State Aid Appropriated	Impact
1982-83	$559,113.52 x .675 =	$377,401.63 x .675 =	$254,746.10
1983-84	300,000.00 x .675 =	202,500.00 x .675 =	136,687.50
1984-85	600,000.00 x .675 =	405,000.00 x .675 =	273,375.00
TOTAL	$1,459,113.52	$984,901.63	$664,808.60

Petitioner challenges this computation as being inadequately supported and explained, but offers no countercomputation of its own upon which to rely.

I reviewed the computation, and **FIND** as a matter of fact that it is accurate and appropriate.

CONCLUSION

On the basis of the above Finding of Fact, I **CONCLUDE** as a matter of law that the respondent Department of Education has accurately computed the amount of state aid owed by the District between 1981 and 1984 in the amount of $664,808.60.

DISPOSITION

On the basis of the above Findings of Fact and Conclusions of Law, it is **ORDERED** that the petition of the Board of Education of the Burlington County Special Services School District appealing from an audit exception issued by the respondent Department of Education is **DISMISSED** and the District **ORDERED** to pay the full amount of state aid owing as found in this Initial Decision.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10(c).

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

February 14, 1990
DATE

Richard J. Murphy
RICHARD J. MURPHY, ALJ

Agency Receipt:

2/15/90
DATE

Seymour Cooperman
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 20 1990
DATE

Jacquelyn LaVecchia
OFFICE OF ADMINISTRATIVE LAW

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BOARD OF EDUCATION OF THE BURLINGTON COUNTY SPECIAL SERVICES SCHOOL DISTRICT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and respondent's reply were timely filed pursuant to N.J.A.C. 1:1-18.4.

The Board's exceptions argue that the ALJ's decision "***is wholly unfounded as no basis in fact, law or statutory authority has been set forth which adequately provides for such a conclusion by the Department.***" (Board's Exceptions, at p. 3) More specifically, the Board avers that respondent's submission to the ALJ on January 11, 1989, which sets forth the calculation for the $664,808.60 at dispute herein, is nothing more than a reiteration of Exhibit G of respondent's original Motion for Summary Decision which was previously deemed to be inconclusive by the ALJ and the Commissioner. The Board also objects to the calculation since no supporting law or authority was cited for reaching that figure/determination.

Respondent's reply exceptions aver in pertinent part:

> Petitioner, in its exceptions, argues that there was no supporting law or authority for the adoption of the Respondent's calculation. What Petitioner ignores, however, is that Petitioner did not respond to the Department's calculation by setting forth any specific facts showing that there is a genuine issue which can only be determined in an evidentiary hearing. See N.J.A.C. 1:1-12(a). Petitioner has offered no computation of what the proper calculation should be especially since the amount of the transfers is not disputed. Moreover, Petitioner has not even specifically identified its objections to the Department's calculation. Thus, granting of summary judgment on this issue was appropriate.
>
> Furthermore, as the letter dated January 11, 1989 setting forth the calculation demonstrates, the State's method of computating the amount owed is reasonable and appropriate. The computation

identified the amount of transfer to the capital outlay account in each of the relevant years. Since that amount would have been surplus in the current expense account, the District would have had to apply 67½% of that amount to reduce the following year's budget.*** Once the following year's budget is reduced by 67½% of the "surplus" amount, the next year's state aid would be reduced by 67½% of that amount.

For example, in the 1984-85 school year, the transfer to capital outlay was $600,000. For the following school year, Petitioner's budget would have been reduced by 67½% of that amount, i.e., $405,000. Thus, the budget was actually $405,000 higher than appropriate and the District received 67½% of that higher budgeted amount through state aid. The District therefore received $273,375 in state aid to which it was not entitled. This computation done in each of the three years at issue, as reflected in Exhibit B, provides an accurate calculation of the amount of state aid that was overpaid. (Reply Exceptions, at pp. 4-6)

Upon review of the record in this matter and the parties' exceptions, the Commissioner agrees with the ALJ's finding and conclusion that the calculation for the sum of $664,808.60 is accurate and appropriate. Count One of the Petition of Appeal in this matter remained open for further proceedings "***for the limited purpose of determining the exact amount of state aid monies due and owing the Department by petitioner. The conclusion reached by the ALJ that the Department is entitled to prevail as a matter of law in obtaining repayment is not subject to further inquiry***." (emphasis supplied) (Partial Summary Decision dated January 10, 1989, at p. 16, aff'd State Board June 7, 1989)

As demonstrated above, the only issue which remained alive after January 10, 1989 was whether the sum of $664,808.60 being sought by respondent was accurate. As such, respondent was ordered to set forth "***a precise computation of the $664,808.60 figure and the [petitioner] shall submit a responsive computation to enable the judge to determine the amount of repayment." (Id., at p. 17)

A review of petitioner's response to the Department's precise calculation (see April 10, 1989 letter from petitioner to ALJ) reveals that it did not quarrel with the accuracy of the calculation/computation nor did it set forth a responsive computation. Rather, it merely reiterated the objections it set forth with respect to the original sum, the essence of which is delineated almost verbatim in its exceptions summarized above.

Examination of the calculation submitted by respondent and as set forth on page 2 of the initial decision indicates a reasonable and appropriate computation for repayment of state aid which petitioner by law was not entitled to receive as explained in detail in the prior decision in this matter. The chart identifies

the amount of impermissive transfers to the capital outlay account in each of the three years in question and the precise impact that the illegal transfers created in terms of state aid wrongfully received by petitioner as well explicated in respondent's exception quoted above.

Accordingly, the Petition of Appeal is dismissed and petitioner is ordered to pay the full amount of state aid owing to respondent, $664,808.60.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

BOARD OF EDUCATION OF THE BURLINGTON COUNTY SPECIAL SERVICES SCHOOL DISTRICT,	:	
PETITIONER-APPELLANT,	:	STATE BOARD OF EDUCATION
V.	:	DECISION
NEW JERSEY STATE DEPARTMENT OF EDUCATION,	:	
RESPONDENT-RESPONDENT.	:	

Decision by the Commissioner of Education, January 10, 1989

Decision by the State Board of Education, June 9, 1989

Decided by the Commissioner of Education, March 28, 1990

For the Petitioner-Appellant, Parker, McCay & Criscuolo (Thomas S. Harty, Esq., of Counsel)

For the Respondent-Respondent, Nancy Kaplan Miller, Deputy Attorney General (Robert J. Del Tufo, Attorney General)

This matter arose when the Assistant Commissioner, Division of Finance, determined that the Burlington County Special Services School District was required to pay $664,808.60 in State aid because it had transferred funds over several years from its current expense account to its capital account resulting in the payment of State aid for county expenses. By petition to the Commissioner of Education, the District challenged the determination, and, on June 9, 1989, we affirmed the Commissioner's decision which, adopting the Administrative Law Judge's (ALJ) recommendation, found that under the pertinent statutes, said transfers had resulted in improper State aid and which granted summary judgment to Respondent Department of Education except to the extent that the record was to remain open "for the limited purpose of determining the exact amount of State aid monies due and owing the Department by petitioner." Commissioner's decision of January 10, 1989, at 16.[1]

By decision of March 28, 1990, the Commissioner, adopting the ALJ's findings with respect to the appropriateness of the Department's calculation, determined that the amount of State aid

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[1] We note that appeal from our decision of June 9, 1989, was taken to the Appellate Division. Based on the pendency of the issue before us today, the matter was voluntarily dismissed without prejudice by Stipulation of Dismissal dated September 28, 1989.

that the District was to repay was $664,808.60. The District has appealed that decision to the State Board.

The only issue properly before us in this appeal is the propriety of the calculation of the amount decided by the Commissioner to be the amount of overpayment of State aid. Although not challenging the actual computation, the District disputes that amount on the grounds that the funds upon which the amount was determined included resources derived from the county.

Having considered the arguments of counsel, we reject the District's argument. As argued by the Department, and as settled by our prior decision in this matter, the transfers of funds by the District from its current expense account to its capital account were impermissible regardless of the source of the revenues. These transfers resulted in the overpayment of State aid which must now be returned.

In that the Distirct has failed to show that the amount is inaccurate, and, for the reasons expressed therein, the State Board of Education affirms the decision of the Commissioner.

August 1, 1990

Pending N.J. Superior Court

PETER J. KUEKEN, JR.	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
MARY L. GUZMAN AND BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY,	:	DECISION
RESPONDENTS.	:	
	:	

This matter has been opened before the Commissioner by way of a Petition of Appeal for Declaratory Judgment from Peter J. Kueken, Jr., a candidate seeking election to a three-year term on the Passaic Board of Education. Mr. Kueken asks the Commissioner to construe the provisions of N.J.S.A. 18A:14-10 and to declare that Respondent Mary L. Guzman be precluded from running for a new three-year term on the Board of Education of the City of Passaic while serving as a currently sitting board member with one year remaining on her current term.

Mr. Kueken sets forth the following arguments in his petition:

1. When Mary L. Guzman decided to run for the elected seat which she is presently occupying, she had to file a petition with ten, qualified voter signatures. On the petition it clearly states that she would have to run for a three-year term, and when elected would agree to accept and to qualify into said office for three years. She has one more year to serve.

   By submitting this new petition for a three-year term, Mary L. Guzman is breaching her original petition and oath to serve the city of Passaic for three years. Those who originally endorsed her in the petition, for the seat she is presently occupying, were obviously misled.

2. On Tuesday, March 8, 1990, I spoke to school-board attorney, Matthew J. Michaelis. He said that there is not statute or case regarding what Mary L. Guzman is doing; therefore, he and the Passaic Board of Education can not make a ruling against her. He said that the only decision ever made was one on March 22, 1977, where someone on the school board in

West Milford Township ran for two seats at the same time. The commissioner ruled against that case. In Passaic's case, a trustee is running for a different set and will resign her remaining seat if she wins, which will allow the board of education to appoint someone to fill that seat.

3. In 1968, the residents of the city of Passaic voted to have an elected board of education; since that year the registered voters of Passaic have voted for their school board candidates. If Mary L. Guzman wins the new, three-year seat, she will have to resign her old seat which has one year remaining. This will enable the Passaic Board of Education to appoint one of their political cohorts to the board to fill the one-year seat. This circuitous move on Mary L. Guzman's part will take the decision-making process away from the voters. We live in a democratic society (a representative democracy) where everyone has a right to vote for their elected representatives. Allowing Mary L. Guzman to run in this election will take away the people's voice. She will be truly circumventing the spirit of the law.

(Petition, at pp. 1-2)

Respondent Mary L. Guzman in response to the petitioner's claim sets forth the following argument in defense of her right to run for a new three-year term while presently occupying an unexpired term on the Board:

1. I was elected to the Board of Education of the City of Passaic for a three year term, approximately two years ago, and I have one more year relevant to that term of office. I am presently a candidate for election for a seat on the Board in the April 24, 1990 election for a new three year term. If elected, I would resign my previous seat which has one year to go, prior to being sworn in for my new term of office.

   The allegations contained in Paragraph 1 of the within Petition are in all other respects inaccurate since N.J.S.A. 18A:14-10 mandates that a candidate must certify that if elected, he or she agrees to accept and qualify into said office. The statute does not require a certification to accept and qualify into said office <u>for three years</u>. If such were the case, a person would be prohibited from resigning and we know this is not true.

In fact, if elected, I agree to accept and qualify into said office since, as stated above, I would resign my previous seat.

2. The West Milford case referred to in Paragraph 2 of the Petition is not relevant to this matter since it dealt with a person running for two seats at the same time. I am only running for one seat, not two.

The West Milford case held that no candidate can hold two separate seats simultaneously and, therefore, may not file for two such seats. Additionally, it held a candidate is not permitted to file for a seat for which he/she does not intend to stand as a candidate for election. The above is not the situation concerning me since I am not running for two separate seats simultaneously and as a candidate I intent to stand as a candidate for election.

3. Petitioner uses democracy in reverse in Paragraph 3 of the Petition since living in a democracy permits me to run for the office in issue if I so desire and if the voters do not want to elect me, they need not case a vote for my election. If the voters agree with Petitioner they will not vote for me. However, if the voters feel I am entitled to run and want me to be elected in this new seat, then in this democratic society, I should be allowed to run and the voters should be allowed to vote for me.

The fact that by my re-election, a vacancy would be created, is irrelevant. There is State Statute dealing with vacancies of the Board and the other allegations in Paragraph 3 dealing with the Board's appointment in such vacancy, are totally irrelevant and complete supposition on behalf of Petitioner. It should be noted that Petitioner, who is a candidate for a seat in the present Board election, if elected, he too will have a vote with respect to the appointment.

4. I respectfully submit that there is no law prohibiting me from running for this new seat and, in fact, I comply with the State Statute N.J.S.A. 18A:14-10, that is referred to in the Petition. (emphasis in text)

(Answer, at pp. 1-3)

For the record the Commissioner notes that the Board of Education of the City of Passaic has by way of a letter dated March 22, 1990 indicated that it takes no position on this matter and awaits the Commissioner's decision.

The Commissioner has carefully reviewed the arguments of the parties as well as reviewed the statute in question. While the Commissioner has previously construed the provisions of N.J.S.A. 18A:14-10 to bar one individual from simultaneously seeking election to two separate seats on the board, the current factual circumstances create a matter of first impression. (See In the Matter of the West Milford Township School Election, 1977 S.L.D. 339.) Nonetheless, the Commissioner, in the belief that the same policy considerations are implicated in the resolution of this dispute as existed in West Milford sought the advice of the Attorney General.

In an opinion dated March 23, 1990, the Attorney General concluded that the provisions of N.J.S.A. 18A:14-10 which prescribe the contents of a nominating petition do bar the action of Respondent Guzman in this matter from seeking a three-year term on the Board of Education while she is currently a member of the Board serving in an unexpired term. The Attorney General's Opinion sets forth the following reasoning for barring Ms. Guzman's candidacy:

> N.J.S.A. 18A:14-10 provides that a valid nominating petition must contain a certification signed by the candidate and stating that he is qualified to be elected, that he consents to stand as a candidate and that, if elected, he agrees to accept and qualify for the office. Since it is axiomatic that a person cannot fill two seats on the board simultaneously, the prior decisions have held petitions to be defective if the candidate could not so qualify when the petition was filed. So too here, when the candidate, if successful, would have to resign, thus creating a vacancy which would be filled by appointive, rather than electoral, process.
>
> We note that in West Milford the "taint" was purged by a withdrawal of one of the two petitions. Likewise here the pending petition could be upheld if the candidate were to resign effective immediately, so that the vacancy created by such resignation could be filled prior to the coming election. In that way, the electorate would not be deprived of a real choice, having been made aware before it votes, of the composition of the board.
>
> We do not believe that the Legislature, in prescribing three-year terms for elected school board members, intended to have such terms extended irregularly by means of sitting members seeking to prolong their tenure other than by

> succeeding themselves. To allow such activity would also frustrate the statutory scheme whereby one-third of the board stands for election each year. In the ideal situation, working control of the board is determined in the annual elections, and the vacancy-filling process is not available as a means of depriving the electorate of its voice regarding the make-up and composition of the board. If the instant candidacy is allowed to proceed, all of these negative consequences may occur. (emphasis in text)
>
> (Attorney General's Opinion 90-0066, at p. 2)

In light of the foregoing, the Commissioner finds and determines that Respondent Guzman's nominating petition is defective and that she is ineligible to stand as a candidate for a new three-year term on the Passaic Board of Education unless she resigns the seat which she currently holds. The Commissioner therefore directs the Secretary of the Board of Education of the City of Passaic to strike Mary L. Guzman's name from the ballot unless she shall formally resign the seat she presently holds prior to the time in which the ballot is printed. Should Mary L. Guzman choose not to resign her current seat on the Board and her name is therefore removed from the ballot, all candidates below her in the drawing for position shall move up one place.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6190-89
AGENCY DKT. NO. 257-8/89

LAWRENCE W. NELSON,
INDIVIDUALLY AND AS PARENT
AND NATURAL GUARDIAN OF P.T.N.,
Petitioner,
v.
ROSE M. McCAFFERY,
SUPERINTENDENT OF SCHOOLS,
AND GLEN RIDGE BOARD OF EDUCATION,
Respondents.

Lawrence W. Nelson, *pro se*

Rosalind Kendellen, Esq. for respondents
(Riker, Danzig, Scherer & Hyland, attorneys)

Record Closed: January 8, 1990 Decided: February 16,1990

BEFORE **KEN R. SPRINGER,** ALJ

Statement of the Case

This is an action by a parent of a private school student seeking payment of the transportation allowance under *N.J.S.A.* 18A:39-1. Local school districts which provide transportation to public school children living remote from the schoolhouse

are legally required to provide transportation or pay an allowance to resident children attending nonprofit private schools "located within the State not more than 20 miles from the residence of the pupil."[1] Basically, the dispute is over the proper way to measure the 20-mile limit. Count I of the petition alleges that the "radial" or straight-line distance between home and school is less than 20 miles. Count II alleges, in the alternative, that the length along the school driveway located "on private property" should not be counted, also resulting in a distance of less than 20 miles.[2] School officials contend that correct measurement is "door-to-door," making the distance greater than 20 miles.

Procedural History

Petitioner Lawrence W. Nelson filed his petition with the Commissioner of Education ("Commissioner") on August 3, 1989.[3] Respondents Glen Ridge Board of Education and its superintendent of schools, sued in her official capacity, (collectively, the "Board") filed their answer on August 16, 1989. On August 17,

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[1]"Remote from the schoolhouse" is defined by state regulation as "beyond 2½ miles for high school students (grades 9 through 12) and beyond two miles for elementary pupils (grades kindergarten through eight)." *N.J.A.C.* 6:21-1.3(a).

[2]State regulation further requires that the measurement be made "by the shortest route along the public roadways or walkways" *N.J.A.C.* 6:21-1.3(b).

[3]Petitioner seeks damages for the prior (1988-89) as well as the current (1989-90) school years. Since appeals to the Commissioner must be filed "no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action," the petition might appear to be out-of-time for events occurring in 1988-89. *N.J.A.C.* 6:24-1.2(b). However, petitioner urges that the 90-day rule should be relaxed in light of the parties' good faith efforts to resolve the dispute. See *Polaha v. Buena Reg. Sch. Dist.*, No. A-1359-85T7 (N.J. App. Div. Oct. 7, 1986). Similarly, the Board agrees that it has purposely waived the 90-day rule as an affirmative defense. Moreover, the 90-day rule does not bar suits to enforce statutory entitlements. *North Plainfield Ed. Ass'n v. North Plainfield Bd. of Ed.*, 96 *N.J.* 587 (1984).

1989, the Commissioner transmitted the matter to the Office of Administrative Law ("OAL") for hearing as a contested case.

Subsequently, on September 25, 1989, petitioner filed a motion for summary decision, together with supporting affidavit and brief. The Board filed opposing papers and its own cross-motion for summary decision on October 18, 1989. Petitioner filed a rely on October 25, 1989. Both parties jointly submitted a written stipulation of facts on November 27, 1989. The OAL held oral argument via the telephone on January 8, 1990.

Findings of Fact

All of the material facts necessary for summary disposition of this matter are either stipulated or undisputed. **I FIND**:

Petitioner and his family reside in Glen Ridge, New Jersey. Petitioner's son, a high school sophomore, attended the Delbarton School in Morristown, New Jersey during the 1988-89 school year. Delbarton School is not operated for profit and is located within this State. Although petitioner filed the application forms in a timely manner, the Board denied payment of any transportation allowance solely due to the 20-mile limit.

Despite differing interpretations as to what the law requires, the parties are fundamentally in agreement on the underlying facts. On May 31, 1989, an employee of the State Office of Weights and Measures measured the route from "the center of the front door" of petitioner's residence to "the Delbarton School front door using their driveway from Rte. 24" and determined that distance to be 20.650 miles. At petitioner's request, on June 23, 1989 the same state agency remeasured the route from an identical starting point to "a point at the beginning of the Delbarton School driveway" closest to Route 24 and determined that distance to be 19.810 miles. Neither side challenges these physical measurements. Thus, the battle lines are clearly drawn. If the driveway is counted, the distance is greater than 20 miles. If not, the distance is less than 20 miles.

It is further established that the driveway in question is located on property owned by Delbarton School. Roughly eight-tenths of a mile in length, the driveway is paved and has two lanes of traffic, except for a one-way section in the shape of a loop. Delbarton School paid for construction of the driveway, and also maintains and repairs it. As recently at 1988, the Morris Township Planning Board ruled that the road network on school property need not be built to the standards for public roads. There is a steel gate at the entry to the driveway from Route 24, which gate is locked from time to time for security reasons. A sign posted nearby warns that the area is private property and that hunting, fishing, trapping or trespassing for any purpose is strictly forbidden. Snow removal and policing functions are conducted by the school and its contractors.

Public access to the driveway is restricted to individuals having legitimate dealings with the school. Delbarton School has its own security force, which patrols the driveway with directions to remove anybody who is not on school-related business. Vehicles delivering students to school do not drop off or receive passengers at the gate, but proceed up the driveway to the vicinity of the school buildings. Teachers park their cars in the lot adjacent to the school buildings. Many other persons, including letter carriers, truck drivers, sanitation workers, and food suppliers, regularly use the driveway to get to and from the school.

For purposes of these motions, it will be assumed that the radial or straight-line distance between petitioner's residence and the Delbarton School is 17.3 miles. In his verified petition, the petitioner alleges this to be so. While the Board pleads a lack of knowledge or information sufficient to form a belief as to the truth of that allegation, it has not suggested any different measurement.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the Delbarton School is situated more than 20 miles from petitioner's residence and, consequently, that petitioner's son fails to qualify for transportation assistance.

Authority for free transportation of children to nonpublic schools derives from *Art.* VIII, §4, ¶3 of the State Constitution of 1947, which grants to the Legislature the express power to provide for the transportation of school-aged children to and from

any school "within reasonable limitations as to distance." *N.J.S.A.* 18A:39-1 mandates that whenever any school district provides transportation for public school pupils residing remote from any schoolhouse, transportation must also be supplied for each student to and from any remote nonprofit private or parochial school "located within the State not more than 20 miles from the residence of the pupil." Exceptions are made for districts which provide transportation only for handicapped children or for children at public vocational schools. The same or similar statutory schemes have successfully withstood repeated constitutional attack on either establishment clause grounds, *Everson v. Ewing Twp. Bd. of Ed.*, 133 *N.J.L.* 350 (E.& A. 1945), aff'd 330 U.S. 1 (1947), or equal protection grounds, *West Morris Reg. Bd. of Ed. v. Sills*, 58 *N.J.* 464 (1971), *cert.* den. 404 U.S. 986 (1971) and *Reed v. Att'y Gen.*, 195 *N.J. Super.* 172 (App. Div. 1984).

Aside from the introductory reference to "schoolhouse" rather than "gate" or "driveway," the statute itself provides little help on how to measure the distance between school and residence. Therefore, petitioner turns for guidance to the corresponding regulation. Preliminarily, it should be noted that the regulation, *N.J.A.C.* 6:21-1.3, focuses on the minimum 2- or 2½-mile distance necessary to be considered "remote from the schoolhouse" and not on the maximum 20-mile distance beyond which any entitlement ceases. In that limited context, *N.J.A.C.* 6:21-1.3(b) provides,

> measurement shall be made by the shortest route along public roadways or walkways from the entrance of the pupil's residence nearest such public roadway or walkway to the nearest public entrance of the assigned school.

Seizing on the language "public roadways or walkways," petitioner urges that the driveway at Delbarton School is "private" and cannot be included in the measurement. Accordingly, petitioner concludes that the "nearest public entrance" within the meaning of the regulation is the intersection of the driveway with Route 24.

Petitioner's hypertechnical and legalistic argument must be rejected in favor of a common sense and practical approach. Words in a statute are to be given their ordinary and well-understood meaning in the absence of explicit indication of

special meaning. *Fahey v. Jersey City*, 52 *N.J.* 103, 107 (1968); *Lopez v. Santiago*, 125 *N.J. Super.* 268, 270 (App. Div. 1973). What obviously was intended by use of the adjective "public" in the regulation was to prevent school boards from depriving students of rightful transportation by forcing them to trespass across neighbors' yards or take shortcuts through back alleys, empty fields and lonely forests in order to shorten the distance to school. Nothing suggests that the proscription was ever meant to extend to situations such as the present one, where a paved two-lane roadway, open to vehicular traffic, is regularly used by students and teachers alike to gain access to otherwise landlocked school buildings.

School law decisions interpreting *N.J.S.A.* 18A:39-1 measure the distance by starting at the front door of the student's home and ending at the nearest door of the school. See, *e.g.*, *Shields v. West Paterson Bd. of Ed.*, 1980 *S.L.D.* 1004 (Comm'r Aug. 28, 1980). In at least one instance, the route to a nonpublic school was plotted to include a "private interior vehicular roadway." *Tenzer v. Tenafly Bd. of Ed.*, 1985 *S.L.D.* __ (Comm'r May 17, 1985). Significantly, petitioner conceded at oral argument that he knew of no reported case where the measurement stopped at the school driveway. Moreover, the position taken by petitioner is internally inconsistent, in that it recognizes the appropriateness of including the length of a private driveway at one end of the route (*i.e.*, the home) but not at the other end (i.e., the school).

Lastly, petitioner's contention that the distance should be measured by radial miles, as distinguished from road miles, is totally meritless. Indeed, the single administrative ruling cited by petitioner in his moving papers stands for the exactly opposite proposition. *Horner v. Kingsway Reg. H.S. Dist.*, 1979 *S.L.D.* 487 (Comm'r Aug. 30, 1979), aff'd 1979 *S.L.D.* 493 (St. Bd. Dec. 5, 1979).

Order

It is **ORDERED** that the Board's motion for summary decision is granted and petitioner's motion for summary decision is denied.

And it is further **ORDERED** that the relief requested by petitioner is denied.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

Feb. 16, 1990
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

3/22/90
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 22 1990
Date

OFFICE OF ADMINISTRATIVE LAW

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LAWRENCE W. NELSON, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF P.T.N.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY, AND ROSE M. MC CAFFERY, SUPERINTENDENT,	:	DECISION
RESPONDENTS.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by petitioner and replies thereto by respondent ("the Board") were timely filed pursuant to N.J.A.C. 1:1-18.4.

In his exceptions, petitioner argues that the ALJ ignored the plain language of the controlling regulation ("public" entrance) and imposed upon it an interpretation that is supported neither by prior case law, of which there is none specifically on point, nor his own findings of fact, which clearly establish that Delbarton's driveway is private property. Further, the ALJ's interpretation runs counter to the well-established principle of law that statutes and regulations which are intended to confer benefits should be liberally construed in order to do so. Petitioner also objects to the ALJ's assessment of his position as internally inconsistent, arguing that distinctions in the language of the regulation itself ("entrance" of the pupil's residence, as opposed to "nearest public entrance" of the school of attendance) support his claim. Finally, petitioner takes exception to the ALJ's dismissal of his entire petition, when, in moving for summary judgment on Count II, he had specifically reserved his right to pursue Count I (radial measurement) in the event he did not prevail on Count II.

In reply, the Board refers the Commissioner to the arguments of its earlier brief, which essentially hold that petitioner's interpretation of N.J.A.C. 6:21-1.3(b) is inconsistent with the regulation's intent, sound public policy and prior case law on determining transportation distances for reimbursement purposes.

Upon a careful review of this matter, the Commissioner concurs with the ALJ that petitioner is not entitled to the reimbursement he seeks. Petitioner's entire argument hinges on what he perceives to be subtle distinctions in the language of N.J.A.C. 6:21-1.3(b), which provides that

> measurement shall be made by the shortest route along public roadways or public walkways from the entrance of the pupil's residence nearest such public roadway or public walkway to the nearest public entrance of the assigned school.

The difficulty with petitioner's interpretation is that it reads the regulation purely in the abstract and altogether fails to consider its context. Although N.J.A.C. 6:21-1.3(b) has historically been used as the basis for calculating all pupil transportation distances, the regulation in fact pertains specifically to measurement of the 2-2½ mile remoteness distance set forth in N.J.A.C. 6:21-1.3(a) in codification of N.J.S.A. 18A:39-1. Accordingly, its language must be construed from that perspective. Petitioner seeks to impute great significance to the precise placement of the word "public," both to differentiate publically from privately owned roads, and to justify inclusion of private residential driveways while simultaneously excluding private school driveways in measuring transportation distances. A plain reading of the regulation within the context of the 2-2½ mile rule, however, shows that it intended no such distinctions. Rather, as the ALJ well recognizes,

> ***What obviously was intended by use of the adjective "public" in the regulation was to prevent school boards from depriving students of rightful transportation by forcing them to trespass across neighbors' yards or take shortcuts through back alleys, empty fields and lonely forests in order to shorten the distance to school.*** (Initial Decision, at p. 6)

In simplest terms, what this regulation clearly requires, and what the Department of Education has consistently held it to mean, is that pupil transportation distances are to be measured from door-to-door; specifically from the door of the pupil's home to the nearest entrance of the school building by which students (as opposed to, say, delivery men) normally enter. Further, such measurement is to be along a route used for regular vehicular and/or pedestrian traffic, as opposed to a route requiring shortcuts of the type described by the ALJ. Its use of the word "public" cannot be construed as an attempt to differentiate public property from private strictly in terms of ownership, as such a distinction would be irrelevant for purposes of measuring transportation distances for the public school pupils to whom the regulation was drafted to apply. Rather, the term is plainly meant to apply to commonality and habitualness of usage for purposes of pupil safety. Within this framework, the fact that the paved, two-lane roadway by which students and vehicles regularly access Delbarton school buildings is owned and maintained by the school rather than by a public entity is of no import whatsoever.

Neither is there any merit to the proposition, based on the absence of the phrase "nearest public" with respect to entrances of pupil residences, that inclusion of that phrase with respect to school entrances requires a differentiation between the point beyond which only persons on school-related business may pass, e.g. the gateway to the grounds of a private school complex, and the actual entrance used by students to enter the school building. Nor does it justify the internal inconsistency, noted by the ALJ, of petitioner's stance that the driveway of the pupil's residence is properly included in measuring transportation distance while the driveway of the school building is explicitly excluded. Such a

reading elevates the sense of individual words above the context in which they occur, and is particularly inappropriate in construing a regulation which has been extended to apply to situations beyond those for which it was written. N.J.A.C. 6:21-1.3(b), when applied to all pupil transportation distances rather than only to public school remoteness determinations, stands solely and exclusively for the proposition that transportation measurements are to be calculated from door-to-door and over established thoroughfares.

The Commissioner notes petitioner's arguments regarding liberal construction of statute and abrogation of his right to pursue Count I. He holds, however, that the construction sought by petitioner in Count II is beyond the bounds of what the statute and its implementing regulation intended to confer and, indeed, is counter to the general legislative scheme of imposing reasonable limitations on transportation benefits to nonpublic pupils. The construction sought in Count I (radial measurement), on the other hand, has long since been discounted in this forum, Horner, supra, and would likewise be precluded by the determinations reached on Count II above. Therefore, no good purpose would be served by allowing petitioner to continue proceedings in this matter.

Accordingly, for the reasons stated in the initial decision together with the additional reasons herein, the recommendation of the Office of Administrative Law dismissing the instant Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

LAWRENCE W. NELSON, INDIVIDUALLY AND AS PARENT AND NATURAL GUARDIAN OF P.T.N.,	:	
PETITIONER-APPELLANT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF GLEN RIDGE, ESSEX COUNTY, AND ROSE M. MC CAFFERY, SUPERINTENDENT,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, April 4, 1990

For the Petitioner-Appellant, Lawrence W. Nelson, pro se

For the Respondent-Respondent, Riker, Danzig, Scherer & Hyland (Rosalind Kendellen, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

August 1, 1990

Pending N.J. Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5066-89
AGENCY DKT. NO. 144-5/89

EDWARD P. MIGLIACCIO,
Petitioner,
v.
BOARD OF EDUCATION
OF THE CITY OF PATERSON,
Respondent.

Paul E. Griggs, Esq. for petitioner

Donald A. Kessler, Esq. for respondent
(Shablik, Kessler & Finestein, attorneys)

Record Closed: January 4, 1990 Decided: February 14, 1990

BEFORE **KEN R. SPRINGER**, ALJ

Statement of the Case

This is a contract claim by a school administrator who seeks an increase in his salary. Petitioner Edward P. Migliaccio ("Migliaccio"), employed as board secretary/business administrator by the Paterson school district, contends that his employer failed to recognize his longevity credit and his stipend for graduate-level education

Presently the matter comes before the Office of Administrative Law ("OAL") on the school board's motion for summary decision pursuant to *N.J.A.C.* 1:1-12.5.

Procedural History

Migliaccio filed his verified petition with the Commissioner of Education ("Commissioner") on May 16, 1989. Respondent Paterson Board of Education ("Board") filed its answer on July 10, 1989. Subsequently, on July 13, 1989, the Commissioner transmitted the file to the OAL for hearing as a contested case. On November 21, 1989, the Board filed its notice of motion, together with supporting certification and brief. Migliaccio filed his opposing certification and brief on December 14, 1989. Then the Board filed a reply on January 4, 1989. The matter is now ready for ruling on the papers. *N.J.A.C.* 1:1-12.2(e).

Findings of Fact

For purposes of this summary decision motion, the facts and any inferences to be drawn therefrom must be viewed in a light most favorable to the party opposing the relief. All of the material facts necessary for full resolution of this controversy are either stipulated or not genuinely in dispute. **I FIND**.

Edward P. Migliaccio has worked for the Board since 1956. Until 1986-87, he served in the capacity of an administrative assistant, spending roughly half his time assisting the business administrator. Although the parties disagree on Migliaccio's total earnings from overtime and special summer projects, they agree that his regular salary in 1986-87 was $53,058, which already included two adjustments for longevity. At the end of December 1987, then board secretary/business administrator Charles Reilly retired and his position became vacant. Starting on May 1, 1987, Migliaccio assumed the position of board secretary/business administrator on an acting basis.

As a result of arms-length negotiations with the Board, Migliaccio's starting salary in his new job for 1987-88 was set at $67,326. That is exactly the amount which Migliaccio contends represents his total earnings at his old job in 1986-87. It is stipulated that Migliaccio did not institute grievance proceeding or litigation in any forum challenging the amount of his initial salary. Specifically, he failed to pursue

any avenue of appeal from the calculation of his longevity credit or his entitlement to any academic degree stipend.

One year later, on April 1, 1988, Migliaccio became the permanent board secretary/business administrator and achieved instant tenure in that position. His salary remained for three months at the same level of $67,326. In July 1988 Migliaccio received a raise which increased his annual salary for 1988-89 to $70,406. Whether or not Migliaccio was satisfied with that salary, he did not at that time file an appeal to any arbitrator, state agency or court. Migliaccio's only explanation for his acquiescence was that he "deferred" to a request by the board president, who allegedly told him that his demand for higher salary would make ongoing salary negotiations with other school employees more "difficult" in the eyes of the public. Despite Migliaccio's insistence that he never "acknowledge[d] or agree[d] that [his] salary included longevities and degree stipends," he nonetheless continued to collect his salary at the designated rate.

On February 16, 1989, the Board's protracted contract negotiations with its administrators finally concluded. Migliaccio received another salary increase, "finalizing" his salary for 1988-89 at $75,390. By virtue of related Board action taken that same date, Migliaccio's salary for 1989-90 rose to $83,306, effective July 1, 1989, and will again rise to $92,053 for 1990-91. Not until May 16, 1989 did Migliaccio bring this appeal before the Commissioner, raising for the first time his claim for additional longevity credits and degree stipends.

Conclusions of Law

Based on the foregoing facts and the applicable law, **I CONCLUDE** that the petition must be dismissed for failure to comply with the time limits on filing appeals to the Commissioner.

N.J.A.C. 6:24-1.2 prescribes that "[t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested hearing." Case law establishes that this regulation cannot cut off statutory entitlements, but does preclude late filing of claims for contractual rights

benefits. *North Plainfield Ed. Ass'n v. North Plainfield Bd. of Ed.*, 96 *N.J.* 587 (1984). Compare, *Lavin v. Hackensack Bd. of Ed.*, 90 *N.J.* 145 (1982).

Statutes do not guaranty teaching staff members, including certified school administrators, the absolute right to longevity credits or degree stipends. Indeed, *N.J.S.A.* 18A:29-7, which previously provided for higher rates of pay for attaining certain advanced academic degrees, was expressly repealed as the time of passage of the Teacher Quality Employment Act on September 9, 1985. *L.* 1985, c. 321. Initial placement on the salary guide "shall be at such point as may be agreed upon by the member and the employing board of education." *N.J.S.A.* 18A:29-9. *Hyman v. Teaneck Bd. of Ed.*, Dkt. No. A-3508-84T7 (N.J. App. Div. Feb. 26, 1986), certif. den. 104 *N.J.* 469 (1986). Salaries above a statutory minimum, currently $18,500, are the result of collective negotiations and, hence, are contractual in nature. *N.J.S.A.* 18A:29-5. Both parties concede that the 90-day rule applies to school board action in setting employee's salaries, but they differ as to what constitutes a "final" board action triggering the running of the limitation period.

The Board's position is that the 90 days started to run either when Migliaccio was originally appointed to the acting position in May 1987, or when he assumed his permanent post in April 1988, or, at the very latest, when his salary was fixed in July 1988 without reference to additional longevity credits and degree stipends. Migliaccio, on the other hand, maintains that his cause of action did not accrue until the finalization of his 1988-89 salary in February 1989.

Part of the confusion is undoubtedly generated by the coincidence that the district was engaged in general salary negotiations with its supervisory staff at the same time that this particular dispute with Migliaccio arose. However, the record is clear that Migliaccio knew by April 1988, if not sooner, that he would not be receiving separate credit for longevity or academic degrees. From the time that he received his first paycheck in his current job title, he ought to have been aware that the Board had rejected his personal salary claim. *See North Plainfield*, 96 *N.J.* at 594. Migliaccio's own certification acknowledges that he complained about his treatment to the Board president in April 1988, yet admittedly he "did not complain again until February of 1989." Furthermore, he waited more than one year after his informal complaint to the board president before instituting the present administrative appeal. The fact that contemporaneous negotiations culminated in February 1989

with salary increases for a group of central office administrative personnel does not excuse Migliaccio's delay in asserting his individual claim which dated back to April 1988. A cause of action accrues, so that the applicable period of limitation commences to run, when the party seeking to bring the action has an enforceable right. *Andreaggi v. Relis*, 171 *N.J. Super.* 203, 235-36 (Ch. Div. 1979).

Commissioner's decisions have consistently denied stale claims for salary credit brought more than 90 days after notification of the adverse action. *E.g., Union Twp. Ed. Ass'n v. Union Bd. of Ed.*, 1986 *S.L.D.* ___ (Comm'r Oct. 22, 1986) ; *Conner v. River Vale Bd. of Ed.*, 1986 *S.L.D.* ___ (Comm'r Feb. 18, 1986). Migliaccio unsuccessfully attempts to distinguish such cases by drawing distinctions without a difference. It makes no difference that the salary claims in *Union Twp.* and *Conner* happened to be based on prior teaching experience, whereas Migliaccio's claim is based on longevity and academic attainment. Nor does it really matter that *Union Twp.* and *Conner* involved placement at the appropriate step on the guide, whereas Migliaccio seeks extra credit beyond his regular step on the guide. In all these situations, the unifying legal principle is that potential litigants must act swiftly and cannot sleep on their rights. Prompt filing and expeditious processing of actions before the Commissioner serve to preserve the immediacy of the record and to stabilize existing relations, thus avoiding disruption of the educational process. *Pacio v. Bd. of Ed. of Lakeland Reg. H.S. Dist.*, 1989 *S.L.D.* __ (Comm'r June 29, 1989); *Newman v. Bd. of Ed. of Spring Lake Heights*, 1983 *S.L.D.* __ (Comm'r Jan. 19, 1984).

Nevertheless, Migliaccio requests that the Commissioner exercise his authority under *N.J.A.C.* 6:24-1.17 to relax application of the 90-day rule "where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." Exceptions to the 90-day rule should be granted sparingly, and only where there exist compelling circumstances to justify enlargement or relaxation of the time limit. *See Riely v. Bd. of Ed. of Hunterdon Cent. H.S.*, 173 *N.J. Super.* 109 (App. Div. 1980); *Weir v. Bd. of Ed. of N. Valley Reg. H.S. Dist.*, 1984 *S.L.D.* ___ (Comm'r July 20, 1984), aff'd No. A-3520-84T6, slip op at 6 (N.J. App. Div. April 9, 1986); *Bogart v. East Orange Bd. of Ed.*, 1983 *S.L.D.* ___ (Comm'r March 14, 1983). Equitable considerations which might allow relaxation of the rule include good faith discussions between parties to resolve the dispute, *Polaha v. Buena Reg. School Dist.*, No. A-1359-85T7 (N.J. App. Div. Oct. 7, 1986), delay attributable solely to the board of education, *Perrotti v. Newark Bd. of Ed.*, 1981 *S.L.D.* __ (Comm'r May 11, 1981,

aff'd (St. Bd. Sept. 2, 1981), or cases presenting a substantial constitutional issue or matter of significant public interest, *Miller v. Morris Sch. Dist.*, 1980 *S.L.D.* __ (Comm'r Feb. 27, 1980).

No extenuating circumstance is present here. The factual record fails to support Migliaccio's contentions that he was lulled into a false sense of security by Board conduct or that he labored under uncertainty as to his rights. Rather, Migliaccio made the conscious decision to forego asserting his known claim for extra compensation while labor negotiations on salary were still in progress. Bluntly put, he waited until administrators had negotiated the best possible deal on regular salary before pressing his own claim for greater financial gain. Thus, the situation is akin to having gambled on a favorable outcome in one arena before seeking further relief in another. *Riely*, 173 *N.J. Super.* at 114. Whatever the advantages of this course as a bargaining tactic, it is hardly a sympathetic reason to extend the normal time for taking an appeal.

Reservations about the Commissioner's jurisdiction to entertain this subject matter should be noted for the record. Unquestionably the Commissioner of Education possesses broad and expansive authority under *N.J.S.A.* 18A:6-9 "to hear and determine . . . all controversies and disputes arising under the school laws." *Plainfield Bd. of Ed. v. Cooperman*, 105 *N.J.* 587, 596-97 (1987). In this context "school law" disputes are generally those arising under Title 18A, *Fair Lawn Bd. of Ed.*, 143 *N.J. Super.* 259, 266 (Law Div. 1976), aff'd 153 *N.J. Super.* 480 (App. Div. 1977), or those implicating important educational policy considerations such as public school curricula and courses of study, *Hinfey v. Matawan Reg. Bd. of Ed.*, 77 *N.J.* 514, 520 (1987).

But the major focus of the present litigation is the interpretation of petitioner's rights under a collective negotiations agreement. Compensation items such as salary and fringe benefits are quintessential "terms and conditions of employment" within the contemplation of the Public Employment Relations Act. *Englewood Bd. of Ed. v. Englewood Teachers Ass'n*, 64 *N.J.* 1,6 (1964). When a dispute arises as to the meaning of a particular contractual provision or its application to a particular individual, the Commissioner does not necessarily have primary jurisdiction to resolve the issue. *Belleville Ed. Ass'n v. Belleville Bd. of Ed.*, 209 *N.J. Super.* 93 (App. Div. 1986). The State Board of Education will refrain from

deciding contract disputes. *Paladino v. Lacey Twp. Bd. of Ed.*, 1989 *S.L.D.* __, slip. op at 5 (St. Bd. Feb. 1, 1989). Accordingly, even if the petition were timely, it would still be dismissed for failure to state a claim cognizable before the Commissioner.

Order

It is **ORDERED** that the petition in this matter is dismissed.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

Feb. 14, 1990
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

2/20/90
Date

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

FEB 2 1 1990
Date

OFFICE OF ADMINISTRATIVE LAW

al

EDWARD P. MIGLIACCIO,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF PATERSON, PASSAIC COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the provisions of N.J.A.C. 1:1-18.4. The Board timely filed reply exceptions thereto.

Petitioner first contends that the ALJ incorrectly noted or failed to note the following:

> Page 2, paragraph 4 - incomplete - Migliaccio was not placed on the Board Secretary/Business Administrator salary guide for 1987-1988 school year.
>
> Page 3, paragraph 3 - When Migliaccio was appointed permanent Board Secretary/Business Administrator on April 1, 1988, he still was not placed on the salary guide. The longevities and stipends he is grieving are only paid when an employee is placed on the Board Secretary/ Business Administrator salary guide.
>
> Page 4, paragraph 3 - Migliaccio complained about his salary in July of 1988, when he was placed on the salary guide, not in April of 1988, when he was still not on the salary guide and receiving his stipends vis a vis his agreed upon salary (see Migliaccio certification attached to Brief in Opposition to Summary Disposition). (emphasis in text) (Exceptions, at p. 2)

Thereafter, petitioner cites the following exceptions:

> THE NINETY DAY RULE SHOULD HAVE BEEN RELAXED TO PREVENT AN INJUSTICE TO PETITIONER

Petitioner submits that contrary to the ruling of the ALJ, an exception to the 90-day rule should have been granted him because he relied on the Board president's request that he "hold off with respect to his filing a grievance concerning his educational and administrative longevity stipends in consideration of the fact that negotiations were 'in progress' and to talk of same publicly would adversely impact the Board of Education with respect to a negative public perception.***" (Id., at p. 3) He claims that a relaxation

of N.J.A.C 6:24-1.2 is required to avoid a gross injustice to him because he did not file a grievance and go to arbitration on his complaint. In support of his assertion that there are equitable considerations to relax the rule, petitioner cites, inter alia, John Polaha v. Board of Education of the Buena Regional School District, 1984 S.L.D. 1832, rev'd State Board 1985 S.L.D. 1982, rev/rem. N.J. Superior Court Appellate Division October 7, 1986, Commissioner Decision on Remand November 20, 1986, rev'd State Board March 2, 1988.

Moreover, in rebutting the ALJ's conclusion that petitioner waited until negotiations were concluded before pressing his own claim for greater financial gain, petitioner claims he was not a member of any collective bargaining group, since his position is a confidential one precluding his involvement in a bargaining unit. He distinguished the ALJ's reliance on Riely v. Bd. of Ed. of Hunterdon Central H.S., 173 N.J. Super. 109 (App. Div. 1980) in support of not enlarging the time limit by suggesting that he spoke with Board President Evans in July 1988, which "clearly show[s] he was not waiting for the end result of the negotiations.***" (Exceptions, at pp. 4-5) Thus, petitioner avers, the facts in this matter are extenuating and demand equitable treatment.

THE NINETY DAY PERIOD BEGAN WHEN MIGLIACCIO WAS PLACED ON THE SALARY GUIDE

Petitioner notes that he was placed on the salary guide in July 1988, the same time when he complained to the Board president that he was not receiving his scheduled longevity increments and stipends. Thus, he claims, because he "was not placed on the salary guide in April of 1988 when he was appointed Board Secretary/Business Administrator, there was no reason for him to expect that these stipends would be paid, in consideration of the fact that he was alreading (sic) receiving the stipends." (Id.)

Further, petitioner contends that "his placement on the Board Secretary/Business administrator salary guide in July of 1988 at a salary of $70,406.00, was the first time he became aware that he would not be paid his longevities.***" (Id., at p. 6) Thus, he claims his enforceable right was not ripe until July 1988.

MIGLIACCIO MAY NOT BRING AN ACTION BEFORE THE PUBLIC EMPLOYER [sic] RELATIONS COMMISSION

Citing N.J.S.A. 34:13A-3(g) for the definition of a confidential employee, petitioner claims his position as a managerial or confidential employee precludes his participation in any bargaining unit negotiating a contract with the Board. As such, he contends, he does not have a cause of action before PERC, and the Commissioner of Education does have jurisdiction over this matter.

Petitioner seeks reversal of the initial decision and a return of the matter to the Office of Administrative Law for a final hearing.

By way of reply exceptions, the Board first notes that the ALJ failed to mention that at the time petitioner's salary was set for the 1988-89 year, his increase in compensation was based upon

the salary guide and did not include longevities or degree stipends. In support of this position, the Board cites petitioner's brief at pages 5-6 wherein the Board claims that petitioner acknowledges that he did not receive scheduled longevities and stipends on said guide. It also relies upon Paragraph 8(a) of Charles Riley's Certification on behalf of the Board, in this regard. Thereafter, the Board rebuts each of petitioner's exceptions, which are summarized below.

THE 90-DAY RULE SHOULD NOT BE RELAXED IN THIS CASE

The Board avers that on several occasions, petitioner agreed to a salary which included longevities and degree stipends and did not seek to again add those benefits to his salary either within 90 days of May 1, 1987, of April 1, 1988 or of July 1, 1988. Instead, he waited until after the fourth occasion on which his salary was established in the position of Board Secretary/Business Administrator to file an application before the Commissioner; thus, the Board claims, petitioner's failure to assert a timely claim on multiple occasions clearly bars his claim for present and further correction. It cites among other cases, North Plainfield Educ. Ass'n. v. Bd. of Educ., 96 N.J. 587 (1984) in support of this position.

The Board concurs with the ALJ that the reason petitioner delayed in filing his petition was that he "was manipulating negotiation for his own tactical advantage." (Reply Exceptions, at p. 5) As to his reliance on Board President Evans' alleged statements to him, the Board counters that her comments, if made, have no bearing on the interpretation of the 90-day rule because her thoughts "hardly constitute 'Board action'". (Id., at p. 6, Footnote 1) The Board further suggests that it is more important to observe that in May 1987, and in April 1988, which dates were before his July 1988 alleged discussions with Ms. Evans, petitioner accepted his salary which included longevities and degree stipends. Thus, the Board claims, subsequent discussions with Ms. Evans were of no import. The Board submits that petitioner's salary has increased from $53,053 in 1986-87 to $92,053 for 1990-91, and that he should not be permitted to manipulate the agreement between the parties to obtain a further increase.

THE NINETY DAY PERIOD BEGAN ON MAY 1, 1987 WHEN PETITIONER WAS FIRST APPOINTED AS ACTING SECRETARY/BUSINESS ADMINISTRATOR

The Board rebuts petitioner's reliance on N.J.S.A. 18A:29-9 for the proposition that the 90-day rule does not begin until initial placement on the salary guide by submitting that said statute does not have any bearing on the instant matter. It avers that N.J.S.A. 18A:29-9 provides that initial placement on the salary guide is to be negotiated between the employee and the employing Board of Education. The Board claims, therefore, that said statute has no bearing on the instant matter, wherein petitioner challenges acceptance of base salary which includes longevities and degree stipends.

The Board also submits that petitioner admits that he was first placed on the salary guide in July 1988, and acknowledges that

he did not file his petition until May 1989. Thus, the Board contends, by his own admission, petitioner has failed to comply with the 90-day rule.

THE COMMISSIONER OF EDUCATION HAS JURISDICTION OVER THIS MATTER

The Board acknowledges in submitting this point to the Commissioner that neither it nor petitioner contests the issue of jurisdiction. Hence, the Commissioner's consideration of objection to the ALJ's determination that the Commissioner does not have jurisdiction would be as a primary exception to the initial decision. Said exception contained in the Board's reply exceptions is untimely filed, however, pursuant to the prescriptions of N.J.A.C. 1:1-18.4 and, thus, is not made part of the Commissioner's consideration of the Board's arguments.

Upon his careful and independent review of this matter, the Commissioner adopts in part and rejects in part the initial decision rendered in this matter by the Office of Administrative Law. The Commissioner concurs fully with the ALJ that the instant petition is untimely for the reasons expressed in the initial decision. Further, as noted by the Board in its reply exceptions, petitioner admits that he was first placed on the salary guide in July 1988. (See Exceptions, at pages 2 and 6.) It is also clear from the record that his petition was not filed until May 16, 1989. Of his own admission, therefore, petitioner has failed to comply with N.J.A.C. 6:24-1.2.

In so concluding, the Commissioner finds no reason to relax the 90-day rule. Even if petitioner did forestall his petitioning the Commissioner because of the statements of a Board member, he did so at his own peril in that no single board member speaks for the board. He gained no support for his delay in so acting in that no Board action resulted therefrom.

Notwithstanding the above conclusion, the Commissioner observes that were this matter timely filed, it would be cognizable before the Commissioner, contrary to the determination of the ALJ below. The Commissioner observes that the parties agree that petitioner is not a member of a collective bargaining unit because of the confidential nature of the duties of his position as Board Secretary/Business Administrator. N.J.S.A. 34:13A-3(g) Moreover, because the law provides that a board of education may "appoint a school business administrator by a majority vote of all members of the board, define his duties *** and fix his salary*** (N.J.S.A. 18A:17-14.1) (emphasis supplied), issues arising under said law are within the Commissioner of Education's power to adjudicate. In this regard, the conclusion of the ALJ below to the contrary is reversed.

Accordingly, the initial decision is affirmed in part and rejected in part. The Petition of Appeal is determined to be untimely pursuant to N.J.A.C. 6:24-1.2 and is therefore dismissed, with prejudice.

COMMISSIONER OF EDUCATION

IN THE MATTER OF THE DRAWING OF :

BALLOT POSITIONS IN THE CITY OF : COMMISSIONER OF EDUCATION

NEWARK, ESSEX COUNTY. : DECISION

This matter has been opened before the Commissioner by way of a Petition of Appeal filed March 22, 1990, for declaratory judgment. The Board seeking a ratification from the Commissioner that the redrawing for ballot positions of candidates for election to the Board of Education of the City of Newark held on March 15, 1990 at 6:00 p.m. represents the ballot positions of the candidates for election to said board, that the actions taken by the Supervisor of Elections of the Newark School District validating the petition of Ms. Elba L. Torres were proper, and that the redrawing in which Ms. Elba L. Torres could participate was valid and proper.

The Board set forth in its petition for declaratory judgment the following facts:

1. The Board, a type II district without a Board of School Estimate, conducts its elections pursuant to N.J.S.A. 18A:14-1 et seq.

2. Pursuant to N.J.S.A. 18A:14-9, nominating petitions for the 1990 School Board election were to be filed on March 1st, 1990 at 4:00 p.m.

3. On/or about February 28, 1990, a nominating petition was requested by Elba L. Torres.

4. On March 1st, 1990 at 3:44 p.m., Ms. Torres filed a nominating petition containing 18 signatures. (Exhibit A)

5. The Board of Education the City of Newark employs persons to verify that the names contained on the nominating petitions are signatures of registered voters of the Newark district.

6. After being checked by two of the staff members, it was determined that Ms. Elba L. Torres' petition contained the signatures of only (9) nine registered voters in the Newark district.

7. Pursuant to N.J.S.A. 18A:14-12, upon being informed that Ms. Elba L. Torres' petition did not contain the signatures of (10) ten registered voters in the Newark district, the Supervisor of Elections of the Newark School district forthwith notified Ms. Torres that her petition was fatally

defective and she would not be listed as a candidate in the 1990 Annual School Board Election.

8. Ms. Torres was personally informed that her petition was defective on March 2nd, 1990, when she appeared at the scheduled drawing for ballot positions.

9. At that time Ms. Torres was advised of her right to check the petition against the list of the registered voters of the City of Newark by appearing at the office of the Commissioner of Registration and Superintendent of Elections of the County of Essex. The drawing for ballot positions of candidates was held as scheduled and Ms. Torres was not listed as a candidate. (Exhibit B, B,).

10. On or about March 7, 1990, Ms. Torres contacted the Supervisor of Elections of the Newark School district in order to inform him that she was appealing the decision which declared her petition defective.

11. The Supervisor of Elections of the Newark School district and the Commissioner of Registration of the County of Essex, reviewed the [petition] of Elba L. Torres against the list of registered voters of the City of Newark and found that Ms. Torres' petition did contain the signatures of ten registered voters in the Newark district. In order to remedy this situation, the Supervisor of Elections of the Newark School district scheduled a re-drawing for ballot positions, in order to allow Ms. Elba L. Torres to compete on an equal basis with all other candidates.

12. On March 14, 1990, the Supervisor of Elections caused phone calls to be made to each candidate advising them of the redrawing and the reasons therefore. (Exhibit C).

13. On March 14, 1990, the Supervisor of Elections of the Newark School district, sent mailgrams advising each candidate of the re-drawing for ballot positions and the reason therefore. (Exhibit D, D,).

14. On March 14, 1990, the Supervisor of Elections of the Newark School district also attempted to serve each candidate with personal notice by sending a messenger to their homes with a letter notifying them of the re-drawing for ballot positions and explaining the reasons therefore. (See Exhibits E, E,).

15. A re-drawing was held on March 15, 1990 at 6:00 p.m. The results of that drawing are attached hereto as an Exhibit F.

16. At the drawing candidates Anna Saldutti and Beadle Campbell, expressed their objections to a re-drawing. (Exhibit G).

Said facts are uncontested and thus are adopted by the Commissioner as Findings of Fact in this matter.

By letter dated March 23, 1990, the Director of the Bureau of Controversies and Disputes notified each candidate for a seat on the Board of the filing of said request for declaratory judgment. The candidates were advised that they might file a letter memorandum or brief in opposition to the application within five working days of receipt of said notice, whereupon the Commissioner of Education would decide the matters stated above.

One such response was timely filed by Ms. Barbara Todish. Her letter is set forth verbatim below:

I oppose the Board of Education's application for declaratory judgment because I believe that a redrawing of ballot positions was uncalled for as the verification page of Ms. Torres' petition has Elba Torres name printed and the directions in bold face type state that the name of the petitioner swearing/affirming: CAN NOT BE THE CANDIDATE. Also Carmen J. Nunez signature is signed where it is stated that "signature of the same petitioner listed on this section". I ask that the original drawing of ballot positions be upheld (Drawing of Ballot positions on March 2, 1990.) Please accept this letter in lieu of a letter memorandum or brief. I also agree with other reasons/objections that have been brought to my attention i.e. Ms. Saldutti's and Mr. Campbells'.

Barbara A. Todish

p 165 333 386
C Newark Board of Ed

P.S. I also object to the Newark Board of Education omitting to inform candidates, i.e. me, that a NJSBA candidate briefing was to be (and has been) held on March 17, 1990. Also I object to the Newark Board of Education's efforts to prevent, by intimidation or otherwise, [z] community and businesses such as TV stations, from holding candidate forums.
(Letter from Barbara A. Todish dated March 26, 1990)

Upon his careful and independent review of this matter, including the letter from Candidate Todish, the Commissioner affirms the actions of the Board of Education and the Supervisor of Elections of the Newark School District in conducting a redrawing for ballot positions of candidates for election to the Board of Education of the City of Newark held on March 15, 1990 at 6:00 p.m. In so concluding, he deems the concerns expressed by Candidate Todish in her letter dated March 26, 1990 irrelevant to the issues advanced in the Board's request for Declaratory Judgment, and are thus not considered in the Commissioner's resolution of the Board's request.

In reviewing the record, however, the Commissioner observes that while the actions of the Board were proper in acknowledging that it erred in invalidating Ms. Elba L. Torres' petition and rectifying its error by later validating her petition, it is plain that the Board prematurely notified Ms. Torres that her petition was fatally defective without taking the extra measure of securing from the Commissioner of Registration of the County of Essex assurance as to whether Ms. Torres did indeed have the requisite number of signatures from registered voters in the Newark District.

N.J.S.A. 18A:14-13 and N.J.S.A. 18A:14-14 provide a detailed description of the legislative intent that all candidates must be assured an opportunity to be present at the drawing for positions on the ballot and likewise to assure that all candidates have an opportunity to secure by drawing a place on the ballot they perceive to be an affordable one. Having so erred, the Board was obliged to redraw after Ms. Torres' name was inappropriately omitted from consideration for placement on the ballot. Therefore, its action to schedule a redrawing to allow Ms. Torres to compete on an equal basis with all other candidates is hereby affirmed.

Accordingly, the instant petition for declaratory judgment is granted as to its prayer for relief B and C wherein the Board seeks affirmation that the redrawing was valid and proper and that the actions of the Supervisor of the Elections of the Newark School District in calling and holding said redrawing were proper. The Commissioner thus declares that the ballot positions resulting from the March 15, 1990 redrawing represent the ballot positions of the candidates for election to said Board. However, the Commissioner denies affirmation that the actions taken by the Supervisor of Elections of the Newark School district validating the petition of Elba L. Torres were from the outset, proper for the reasons stated above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

IN THE MATTER OF THE DRAWING OF :
BALLOT POSITIONS IN THE CITY OF : STATE BOARD OF EDUCATION
NEWARK, ESSEX COUNTY. : DECISION

Decided by the Commissioner of Education, April 6, 1990

For the Petitioner-Respondent, Associate Counsel, Board of Education of the City of Newark
(Charles Auffant, Esq., of Counsel)

For the Respondent-Appellant, Barbara A. Todish, pro se

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We agree with the Commissioner that the claims asserted by Appellant Barbara Todish, a candidate for election to the Board of Education of the City of Newark, are irrelevant to the issues advanced in the Board's instant request for declaratory judgment with regard to the redrawing of ballot positions for that election. Moreover, there is nothing in the record to indicate that the Appellant was in any way specifically harmed by such action. Our review indicates that even after the redrawing, she retained a highly favorable ballot position -- second in a field of 11 candidates. Candidate Torres, who filed the nominating petition which is challenged by Appellant and which generated the circumstances leading to the redrawing, drew the ninth ballot position.

August 1, 1990

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4589-89
AGENCY REF. NO. 167-5/89

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE,

Petitioner,

v.

TOWNSHIP COUNCIL OF WEST ORANGE,

Respondent.

Stephen J. Christiano, Esq., for petitioner

Matthew J. Scola, Esq., for respondent

Record Closed: January 31, 1990 Decided: February 23, 1990

BEFORE **WARD R. YOUNG,** ALJ:

The West Orange Board of Education (Board) appeals a $600,000 reduction of its surplus for transfer to its current expense appropriations by the Township Council (Council) resulting from the defeat of its 1989-90 proposed budget by the voters of West Orange.

Council asserts its action was a lawful exercise of its discretionary authority.

The matter was transmitted to the Office of Administrative Law as a contested case on June 22, 1989 pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference was held on August 18, 1989, at which the parties agreed to proceed to summary decision on the issue of whether the Council has the authority "to certify a reduction in the amount of

money to be raised through taxation by unilaterally transferring $600,000 from the Board's surplus into the Board's 1989-90 current expense appropriations." In the event Council prevailed on that issue, the parties agreed to proceed to plenary hearing on the issue of whether "Council's transfer of $600,000 from surplus to the Board's 1989-90 current expense appropriation impinges on the Board's responsibility to provide a thorough and efficient education for the pupils in West Orange during the 1989-90 school year."

Summary decision was granted to the Council under date of October 6, 1989 by the undersigned and adopted by the Commissioner on November 13, 1989 and the second issue proceeded to hearing on December 26 and 27, 1989. Post-hearing submissions were filed and the record closed on January 31, 1990.

Factual stipulations are adopted as **FINDINGS OF FACT** and are as follows:

1. Council certified to the Essex County Board of Taxation a total of $784,050 to be levied less than the Board's defeated proposal for the 1989-90 school year.

2. The certified reduction by Council represented $734,050 for current expense and $50,000 for capital outlay. The latter is not contested.

3. $134,050 of the certified reduction for current expense was identified by line items in the Board's budget, which are not contested.

4. $600,000 of the certified reduction was unilaterally transferred by Council [pursuant to Council's direction to the Board] from the Board's surplus into the Board's current expense revenue.

5. The Board's proposed 1989-90 budget incorporated $27,833,836 for current expense and $335,000 for capital outlay, which were both rejected by the voters of West Orange.

6. No certifying statement of reasons was provided to the Board by the Council

when it acted to certify the amount to be levied by taxation with the Essex County Board of Taxation.

7. Council's transfer of $600,000 from surplus was due to excess in that account and there were no educational considerations because no line items were reduced, and there was no impact on the thorough and efficient education to be provided to West Orange pupils in 1989-90.

RELEVANT TESTIMONIAL EVIDENCE

School Business Administrator/Board Secretary James Krieger testified that the basis for the Board's appeal is a back salary judgment affirmed by the Appellate Division on November 1, 1988 (Docket Number A-5792-86T8). The claim by petitioning teaching staff members in that matter totals $1,380,359.18. Krieger stated that full payment of the claim would seriously jeopardize the Board's surplus by a reduction to between $300,000 and $400,000.

Krieger further testified that two bond proposals of about $9,000,000 were rejected by the voters in December, 1988 and the Spring of 1989, and that some $500,000 in repairs and $100,000 in equipment purchases, included in the Board's proposed 1989-90 budget, have been held in abeyance with hope for the $600,000 restoration.

Krieger further testified that $1,700,000 was estimated as the Board's surplus in its 1989-90 proposed budget.

Krieger stated a cross-examination that the June 30, 1989 audit by Touche-Ross indicated $1,745,000. He also stated that monthly reports concerning investments indicate from $2,500,000 to $3,000,000.

Board President Rocco J. Capozzi testified that the major concerns of the Board in the budget development process were the age of its school buildings in need of maintenance, and the judgment of the claim by supplemental teachers. He indicated

that the Board had not as yet transferred the $600,000 from its surplus into its current expense account.

Capozzi stated on cross-examination that the Council defeated a $700,000 transfer from surplus but approved $600,000.

Council member Peter Dunn testified that the Council's action resulted after budget review and consultation with the Board, and was motivated by its desire not to cut educational programs. The Council deemed the surplus reduction of $600,000 to be reasonable as it would leave a sufficient balance for the judgment as well as any emergent need.

Reference was made during direct examination to the Council's rationale and answers to interrogatories propounded by the Board and signed by all Council members, wherein it is stated that, during Council-Board Budget consultations, the Council was impressed by the Board that surplus funds were needed for the judgment and not for school opeations. See P-3, par. 4 and 5.

Council member Joseph P. Brennan, Jr. testified that his proposal to reduce surplus in the amount of $500,000 was defeated. He stated he did not believe the approved $600,000 was unreasonable. He simply felt more comfortable with his proposed reduction. He stated on cross-examination that the Council was definitely guided by its determination not to impact on educational programs. He also stated he did not believe the judgment need was as urgent as perceived by the Board because of the time it would take to resolve the litigation.

Council members Anthony J. Minniti, Tony Katz and Glenn V. Sorge reiterated the testimony of Dunn and Brennan.

RELEVANT DOCUMENTARY EVIDENCE

A petition to the Commissioner was filed in November 1989 by the supplemental

teachers to resolve the judgment issue. Incorporated therein is a claim for $1,380,359.18, as well as allegations of settlement offers by the Board in the amounts of $200,000 and $400,000. See P-1. [The matter was transmitted to the Office of Administrative Law as a contested case on December 19, 1989 and docketed as EDU 9597-89, was preheard by ALJ Reiner on January 19, 1990, and set down for hearing on June 4-8, 1990.]

ARGUMENTS OF COUNSEL

The Board argues the Council's action to reduce surplus by $600,000 was arbitrary, capricious, and without due consideration of educational interests. It also argues that Council's failure to submit a statement of reasons for its surplus reduction violates N.J.A.C. 6:24-7.5 and is inconsistent with Deptford, 116 NJ 305 (1989) and Board of Education of East Brunswick Twp. v. Twp. Council of East Brunswick, 48 N.J. 94 (1966).

The Board further argues that its surplus will fall precariously low upon payment of its judgment, and that the Commissioner noted "that three percent was the percentage exempted under the cap formula" in Board of Education of the City of Perth Amboy v. Council of the City of Perth Amboy, 1987 S.L.D. ____ (decided December 2, 1987). It also argues there is no guarantee the judgment sum will not have to be paid during the 1989-90 school year.

The Board finally argues the surplus reduction will severely impinge on its ability to deliver a thorough and efficient education to its pupils, as it will be unable "to meet the contingencies and vagaries that could arise in the future, but are unforeseen at present," and "will not meet the repair needs of its aging and deteriorating physical plant," and "will lack resources to compensate supplemental claimants."

The Thrust of Council's argument is that its action was not intended "to impair the operation of the West Orange school system or harm the students in any way," and it has not. It also emphasizes that the line item cuts that are not contested "were designed not to adversely affect the school system". Rb at 6.

The Council cites East Brunswick for the proposition that the Commissioner must defer to its action if the reductions do not jeopardize educational goals and objectives.

The statement of reasons argument put forth by the Board is countered by the Council's position that the courts in East Brunswick and Deptford require said statement to be associated only with line item reductions, and there are none disputed herein.

DISCUSSION, FINDINGS, AND CONCLUSIONS

I **FIND** no merit to the Board's argument that the restoration of the $600,000 in dispute is essential for repairs and equipment purchases which have been held in abeyance pending a resolution of this dispute. Such repairs and equipment purchases were not eliminated by the Council's action. The Board had not as yet transferred the $600,000 from surplus to its current expense revenue and allocated to selected line item accounts according to need.

Concerning the need for surplus funds to meet its judgment obligation to 13 Supplemental teachers, there is absolutely no need for any such funds during the 1989-90 school year. As indicated earlier, negotiations to resolve that judgment reached impasse and the matter is now scheduled to be heard in June, 1990 at the Office of Administrative Law. A decision by an administrative law judge could not possibly be rendered until after July 1, 1990, notwithstanding that the Commissioner has 45 days upon receipt of same to render his final decision.

I **FIND** the Board has not met its burden of proof by a preponderance of credible evidence that the Council's action in certifying a reduced tax levy of $600,000 has impinged on the Board's responsibility to provide a thorough and efficient education for West Orange pupils. I **FURTHER FIND** the litigation of this issue to be frivolous in light of stipulated FACT #7.

Concerning the statement of reasons argument, I **FIND** Deptford and East Brunswick inapplicable to the instant matter. It is clear that the courts related the statement of reasons requirement to line item reductions for review and a determination if a local

Board could meet minimum educational standards for the mandated thorough and efficient education of its pupils. There are no educational program implications in the instant matter. **I SO FIND.**

Excluding any surplus accumulation during the current school year, a transfer of $600,000 from surplus would leave a minimum surplus balance of $1,145,000, which is above the reasonable three percent free balance retention addressed by the Commissioner in Board of Education of the City of Perth Amboy v. Council of the City of Perth Amboy, 1989 S.L.D. _____ (decided December 2, 1897).

I CONCLUDE the Petition of Appeal shall be and is hereby **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with Saul Cooperman for consideration.

23 February 1990
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

3/1/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 1 1990
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

dgi

BOARD OF EDUCATION OF THE TOWNSHIP OF WEST ORANGE, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
TOWNSHIP COUNCIL OF THE TOWNSHIP OF WEST ORANGE, ESSEX COUNTY, RESPONDENT.	:	DECISION

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner (hereinafter Board) filed timely exceptions pursuant to the provisions of N.J.A.C. 1:1-18.4. Respondent (hereinafter Council) filed timely reply exceptions thereto.

The Board first claims it never stipulated to No. 7 of the Findings of Fact set forth in the initial decision at page 3. Specifically, it objects to the statement made by the ALJ in Stipulation of Fact No. 7 that a reduction of $600,000 from the Board's surplus has "no impact on the thorough and efficient education to be provided to West Orange pupils in 1989-90." (Exceptions, at p. 1, quoting initial decision, at p. 3) The Board avers that to have so stipulated would have undermined a crucial part of its own case. The Board thus submits that said stipulated fact is in error as is the ALJ's reliance on that stipulation of fact in finding the litigation of the issue of the reduction's impact on the provision of a thorough and efficient education "to be frivolous in light of stipulated FACT #7." (Exceptions, at p. 2, quoting initial decision, at p. 6)

Second, the Board avers that the ALJ misinterpreted the holdings of Deptford, supra, and East Brunswick, supra, in concluding that a statement of reasons need only be provided when a municipality makes line item reductions in a school budget. Claiming that the Council "***never, at any time, furnished petitioner with a statement of reasons for its $600,000.00 reduction of petitioner's surplus," (Exceptions, at p. 2), the Board submits that "East Brunswick concluded that the municipal governing body must submit written detailed explanatory statements for its reductions in a school budget when it makes 'significant aggregate reductions' in that budget." (Id., at p. 2, quoting East Brunswick, at 106) It further contends that Deptford clarified the meaning of "aggregate reductions" by holding that it encompassed any and all budget cuts. It argues that a 35% reduction of its surplus qualified as a budget cut.

Further, the Board argues:

> Even though the Deptford Court makes particular mention that "statements must be provided for any

line-item reductions," it did not intend to limit the requisite submission of a statement of reasons to only those such reductions. The Court goes on to say:

> "On the other hand, by requiring a uniform rule applicable to all budget cuts, we can forestall a dispute over whether the cuts are large enough to warrant an explanation. Further, a uniform rule that calls for the submission of explanatory reasons for all budget cuts will encourage municipalities to be specific and conscientious in their consideration of educational concerns, and will serve to make such considerations an integral part of their decision-making process." (Deptford, slip opinion p. 13, petitioner's emphases).
> (emphasis in original) (Exceptions, at p. 3)

The Board thus contends that the intent of Deptford, supra, was to create a requirement that a municipality furnish a statement of reasons for all budget reductions, not just line item reductions. To find otherwise, the Board avers, would allow municipalities to arbitrarily slash school budget surpluses and avoid the need to explain the rationale for their cuts.

The Board also submits that the record sustains its position that the Council's cut in surplus was arbitrary. The Board contends none of the Council's members could testify as to the reasoning behind the $600,000 reduction.

Third, the Board avers that the ALJ erred in determining that the Board will not have to pay the supplemental claimants in the budget year. The Board submits it was "simply wrong" (Exceptions, at p. 5) for the ALJ to speculate that that case will not be resolved before July 1, 1990 because, it claims, the matter could be settled by the parties before then. If that were to happen, the Board advances, the payment of a large settlement sum to the supplemental teachers, who are the opposing parties to the case, will bring the Board's surplus far below 3% of current expense. Such condition would leave the Board in a financially precarious position relative to emergency repairs and other unforeseen contingencies.

Under separate cover, the Board advances one last argument. It cites the State Board of Education's September 7, 1988 Decision on Motion to Stay the Commissioner's Decision in the matter captioned Bd. of Ed. of the Township of Irvington v. Mayor and Council of the Township of Irvington, decided by the Commissioner October 30, 1987, for the proposition that the ALJ erred in deciding that a statement of reasons need be filed only when the council makes line item reductions and not when it acts to reduce a school budget surplus. It cites the following paragraph from that decision:

> ***Likewise, although we acknowledged that a governing body may consider revenue items such as "surplus" in making reductions to a Board's current expense budget, we concluded that by its failure to indicate a relationship between specific line items in current expenses and any amount of "surplus" and its failure to provide any reasons in support of a conclusion that these revenue amounts were in excess of the Board's needs, the Council's action with respect to "surplus" was arbitrary.
> (Exception dated March 12, 1990, at p. 1, quoting State Board, at p. 6)

The Board seeks reversal of the initial decision and restoration of $600,000 to its surplus account.

By way of reply exceptions, the Council first counters the Board's questioning the ALJ's finding of fact. Council claims the testimony and evidence submitted by the Board "was barren of even the slightest indication that the right of the children of West Orange to a 'thorough and efficient education' was affected by the transfer of $600,000 from surplus to Petitioner's operating budget." (Reply Exceptions, at p. 1) Council submits that the Board "believed that setting (sic) a lawsuit was more important that (sic) the students of West Orange because the evidence at trial was that the $600,000 has still not be (sic) transferred from surplus and that Petitioner had chosen to cut $600,000 in programs and capital improvements to school buildings instead." (Id., at p. 2)

In reply to Exception 2, Council submits that the Board's contention stating that statements of reasons are required for a surplus transfer is a "smoke screen." (Id.) Citing Deptford, supra, at 314-316, Council submits again that statements of reasons are only required for line item cuts and not for an ordered transfer as in the present case where there is actually no budget reduction. It claims there were "no strings attached" (Id.) to the use of the $600,000 once the transfer was made and that even after the transfer, the Board still retained a surplus of $1,100,000.

Council contends the Board's third exception, concerning whether the litigation involving the supplemental teachers would be resolved before July 1, 1990, is frivolous. Council concurs with ALJ Young's initial decision that there is no way the matter will be resolved before July 1, 1990 and, thus, no monies would be paid from the 1989-90 school budget.

Upon his careful and independent review of the instant matter, the Commissioner rejects the initial decision rendered below and remands for further findings for the reasons which follow.

The Commissioner first observes the Board's exception that it did not stipulate to Finding of Fact No. 7 of the initial decision. Although there is no exhibit in the file labeled as a joint stipulation of facts signed by the parties, the ALJ himself includes in his summary of the parties' position at page 5 the following language:

> The Board finally argues the surplus reduction will severely impinge on its ability to deliver a thorough and efficient education to its pupils, as it will be unable "to meet the contingencies and vagaries that could arise in the future, but are unforeseen at present," and "will not meet the repair needs of its aging and deteriorating physical plant," and "will lack resources to compensate supplemental claimants."
> (Initial Decision, at p. 5, quoting Board's Post-hearing Brief, at p. 10)

One is compelled to conclude in light of the above language that the Board did not in fact stipulate to Stipulation of Fact No. 7. For it to do so would negate the second of its two points regarding why the reduction was averred by the Board to be arbitrary. Accordingly, the Commissioner rejects Finding of Fact No. 7 as being an erroneous conclusion on the ALJ's part. From this Stipulation of Fact, the ALJ then made the assumption, it would appear, that since the amount transferred by Council was from surplus, that there is no impact on the provision of a thorough and efficient education for the children of West Orange. Such assumption is similarly erroneous, in light of the Board's challenge to the Council's reducing its surplus account. Consequently, the Commissioner rejects the conclusion as found on page 6 of the initial decision stating:

> I FIND the Board has not met its burden of proof by a preponderance of credible evidence that the Council's action in certifying a reduced tax levy of $600,000 has impinged on the Board's responsibility to provide a thorough and efficient education for West Orange pupils. I FURTHER FIND the litigation of this issue to be frivolous in light of stipulated FACT #7.

The Commissioner further rejects the ALJ's conclusion at pages 6-7 concerning the statement of reasons argument, wherein he found:

> Concerning the statement of reasons argument, I FIND Deptford and East Brunswick inapplicable to the instant matter. It is clear that the courts related the statement of reasons requirement to line item reductions for review and a determination if a local Board could meet minimum educational standards for the mandated thorough and efficient education of its pupils. There are no educational program implications in the instant matter. I SO FIND.

Case law has clearly established that a statement of reasons is required when a governing body acts to reduce a school budget surplus. See Irvington, supra. Therein, in the initial decision, ALJ Stephen Weiss stated the following concerning the need for a statement of reasons in reducing the surplus by transferring funds to current expense:

> ***First of all, no linkage has been shown between any proposed reduction by the respondent of any amount of that surplus. There has been simply a directive to take $3 million because you do not need that much, and I believe specific line item identification is required since there is no educational validation as to why that reduction will not impair the Board's ability to carry out its constitutional mandate. I believe as with the line items for current expense and capital outlay, a linkage based upon valid educational concerns has to be articulated, and this was not done.*** (emphasis supplied)
>
> (Slip Opinion, at p. 21)

The Commissioner affirmed the ALJ's position as follows:

> Finally, the Commissioner agrees that Branchburg, supra, stands for the proposition that a municipal governing body, in the review of a defeated school budget, may consider the Board's anticipated income, the unappropriated free balance and investment income in reaching its determination as to the amount of taxes necessary to provide a thorough and efficient system of education. However, the Commissioner does not agree that any reduction of the tax levy through the required appropriations of such revenue items can be directed by the municipal governing body in an arbitrary manner.
>
> In order to direct such further appropriation for the purpose of tax levy reduction, the municipal governing body is obligated to specifically delineate its reasons why it believes those revenue items are in excess of the Board's needs. Clearly, in the instant matter Council has not met that burden.
>
> The Commissioner hereby adopts as his own the findings and conclusions set forth in the initial decision as supplemented above.
>
> (Slip Opinion, at p. 31)

Thereafter, the State Board of Education in a Decision on Motion to Stay in this case, denied the Township Council's motion stating:

> ***Likewise, although we acknowledged that a governing body may consider revenue items such as "surplus" in making reductions to a Board's current expense budget, we concluded that by its failure to indicate a relationship between specific line items in current expenses and any amount of "surplus" and its failure to provide any reasons in support of a conclusion that these revenue amounts were in excess of the Board's

needs, the Council's action with respect to "surplus" was arbitrary. (Slip Opinion, at p. 6)

Accordingly, the Commissioner rejects the ALJ's conclusion that a township council need not submit a statement of reasons in unilaterally reducing surplus by transferring funds from that account to current expense as a means of defraying the tax levy to be certified to the county board of taxation. Indeed, the Commissioner finds and determines that the West Orange Township Council acted arbitrarily by its failure to specify reasons for reducing the educationally based Board's 1989-90 surplus. (Deptford, supra, at 116, State Board Decision on Motion, Irvington, supra, at p. 6)

Because the ALJ concluded that there were no educational considerations requiring a statement of reasons because no line items were reduced, the record before the Commissioner is inadequate to determine whether said transfer from surplus to current expense will impact on the thorough and efficient education to be provided the pupils of West Orange in 1989-90. Therefore, the Commissioner remands the instant matter with the direction to the ALJ to take testimony and to provide an opportunity to both the Board and Council to consider in detail the merits of any proposed cut from surplus as affecting the provision of a thorough and efficient education for the pupils of West Orange. In so directing, the Commissioner rejects as sufficient reason, the argument advanced by the Council and adopted by the ALJ that the resolution of the judgment against the Board by the supplemental teachers cannot possibly be resolved before July 1, 1990, and that therefore such facts can have no impact on whether the children of West Orange will be provided a thorough and efficient education. First, there always remains the possibility of settlement, as petitioner notes in exceptions. Even discounting that possibility, however, if the matter proceeds into the 1990-91 budget year, the district will still feel the impact of that matter having planned for its budget for that year, and the surplus it feels it must carry to ensure provision of a thorough and efficient education for the 1990-91 school year. Thus, consideration of educational concerns beyond July 1, 1990 must be taken into account in resolving the instant matter on remand.

Accordingly, for the reasons expressed above, the initial decision rendered by the Office of Administrative Law is rejected and remanded for further action consistent with this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

PENDING STATE BOARD

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION

OAL DKT. NOs.EDU 8459-88
EDU 8863-88
AGENCY DKT. NOs. 320-9/38
334-10/88
350-11/88
(CONSOLIDATED CASES)

LUCILLE MCKEON BASS, INEZ BULL,
JULIUS CARRICARTE, ELIZABETH CONNELLY,
JOHNNA DeCARLO, EDWARD H. DELLERT,
RITA DIEHL, EUNICE EUROPA, DORIS GOERKE,
ARELIS GONZALEZ-NEGRON, RUTH ANN GOODE,
EILEEN M. JONES, MARIE KANZACHY, DORIS T. KOHL,
JANET M. LUBRANO, TERI M. MARANDINO, ISABEL MARQUEZ,
JEANETTE MARTUCCI, LINDA McGUIRE-GILHOOLY,
RITA PALUMBO, JOAN DESSEL PEDACE, LYNNETTE S. POTENTE,
MARILYN REGAN, EILEEN KERICK ROTHMAN,
DANIEL V. SCIACCHETANO, AND TRACY SUMMERS,
Petitioners,
v.
UNION CITY BOARD OF EDUCATION,
Respondent.

Gregory T. Syrek, Esq., for petitioners
(Bucceri and Pincus, attorneys)

Louis C. Rosen, Esq., for respondent
(Patino-Treat and Rosen, attorneys)

Record Closed: December 20, 1989 Decided: February 26, 1990

BEFORE **OLIVER B. QUINN, ALJ:**

STATEMENT OF THE CASE

Petitioners, all of whom are teaching staff members or guidance counsellors employed by the Union City Board of Education (respondent), brought this action to challenge the Board of Education's withholding of their salary increments for the 1988-89 school year. Petitioners allege that the Board's action was arbitrary, capricious and unreasonable.

PROCEDURAL HISTORY

On September 28, 1988, a verified petition in this matter was filed on behalf of 25 petitioners. Respondent filed its answer on November 10, 1988. On November 9, 1988, a petition was filed by petitioner Tracy Summers. On June 2, 1989, with the consent of counsel for all parties, the Summer's matter, OAL Dkt. No. EDU 8868-88, was consolidated with this matter. Hearings were held on September 18, 19, 21, and 26; and October 3, 5, 27, and 30, 1989, at the Office of Administrative Law in Newark. The record was held open to allow for the submission of post hearing briefs. The record was closed on December 20, 1989.

A list of witnesses and documentary exhibits is annexed to this decision.

The following petitioners withdrew from this matter during the course of the proceedings: (The withdrawal letters are annexed to this decision.)

Petitioner	Withdrawal Date
Arelis Gonzalez-Negron	September 20, 1989

Ruth Ann Goode	September 20, 1989
Teri M. Marandino	September 20, 1989
Marilyn Regan	September 20, 1989
Joan Dessel Pedace	September 20, 1989
Marie Kazanchy	September 26, 1989
Julius Carricarte	October 3, 1989
Jeanette Martucci	October 3, 1989
Eunice Europa	September 28, 1989
Rita Palumbo	October 3, 1989
Janet Lubrano	October 6, 1989
Eileen Jones	January 2, 1990
Doris Goerke	January 2, 1990
Lucille McKeon Bass	February 6, 1990

Petitioner Eileen Kerick-Rothman entered into a settlement agreement with respondent. The terms of the settlement were placed in the record on October 5, 1989. A fully executed copy of the settlement agreement is annexed to this decision.

The following petitioners remain in this matter:

Inez Bull

Elizabeth Connelly

Johnna DeCarlo

Edward Dellert

Rita Diehl

Doris T. Kohl

Isabel Marquez

Linda McGuire-Gilhooly

Lynette S. Potente

Daniel V. Sciacchetano

Tracy Summers

The petition for all of the remaining petitioners included four common counts:

1. that respondent's action was arbitrary, capricious, and unreasonable because the alleged reasons given in support of respondent's action have no factual basis;

2. that respondent's action was arbitrary, capricious, and unreasonable because it violated the obligation of the respondent to examine the petitioners' attendance history on an individualized basis. The second count alleges that respondent based its actions on a summary conclusion that the lawful use of sick days and/or other personal days, in excess of a certain percentage of available sick and/or personal days, constitutes a basis for withholding the employee's increment. In other words, petitioners allege that respondent withheld their increments based only on their number and/or percentage of absences;

3. that respondent's action was arbitrary, capricious and unreasonable because the alleged reasons given for the salary increment withholdings constituted an unlawful interference with and limitation on statutory and contractual rights to use sick and personal leave.

4. that respondent's action was arbitrary, capricious and unreasonable because they violated their own policies and procedures regarding excessive absences and increment withholdings.

In addition, petitioners Bull, Connelly, DeCarlo, Diehl, Marquez, and McGuire-Gilhooly alleged that respondent's action at its August 16, 1983 meeting violated the Open Public Meetings Act. (N.J.S.A. 10:4-6 et seq.) These petitioners alleged that they were not provided with proper notice in advance of the meeting at which action on their increments was scheduled, thus denying them the opportunity to have the matter discussed in public.

Petitioners DeCarlo, Kohl, and Marquez also alleged that respondent failed and refused to provide them with a written statement of the reasons for its decision to withhold their salary increments, as required in N.J.S.A. 18A:29-14.

Finally, petitioner Summers alleged that respondent failed to pay her $400 owed to her for services as a speech pathologist.

Petitioners Bull, Connelly, Diehl, and Marquez withdrew their allegations of violations of the Open Public Meetings Act.

Petitioner Kohl withdrew her allegation that respondent failed to provide her with a written statement of the reasons for its action.

Petitioner Summers then withdrew her allegation that the district failed to pay her $400 due to her for services as a speech pathologist.

At the conclusion of petitioners' case, respondent made several motions, as follows: Respondent moved to dismiss the allegations that respondent violated the Open Public Meetings Act by not providing petitioners with notice of the August 16, 1988 Board of Education meeting at which action on their increment withholdings was scheduled. That motion was granted because the petitioners had failed to make a prima facie case on this count as to any of the petitioners.

Respondent's counsel also moved to dismiss the count alleging that respondent had not provided to petitioners written reasons for its action in withholding their salary increments. The motion was granted because the petitioners had failed to make a prima facie case that they were not provided with written reasons for the Board's action.

Respondent moved to dismiss the count alleging that Respondent's action was arbitrary, capricious, and unreasonable because it had no factual basis. That motion was denied because petitioners had made a prima facie case in support of this allegation.

Respondent's motions to dismiss the count alleging an unlawful interference with contractual and statutory rights to use sick and personal leave, and the count alleging that the Board had failed to follow its own policies, were granted.

Thus, the counts addressed in this decision are: (1) that respondent's action was arbitrary, capricious, and unreasonable because the action in withholding the salary increments had no factual basis; and (2) that respondent's action in withholding the salary increments was based on the sheer numbers and percentage of leave days used by petitioners.

GENERAL FINDINGS OF FACT

Having heard the testimony and observed the witnesses, and having reviewed the exhibits, I **FIND** the following FACTS by a preponderance of the credible evidence:

1. Assistant Superintendent Joseph Marini singularly administered the attendance review process that resulted in the salary increment withholdings which are challenged herein, with the knowledge and approval of Superintendent Richard Hanna.

2. All petitioners were sent seven form letters by Assistant Superintendent Marini during the review of their attendance. The letters were dated: March or April, 1987; May 26, 1988; July 7, 1988; July 15, 1988; August 3, 1988; August 8, 1988; and August 18, 1988. The letters bore the signature of Superintendent Richard Hanna.

3. All petitioners were sent a form letter, dated August 18, 1988, stating that the reason that their respective increments were being withheld was: "poor attendance during the last two school years, as well as consideration of your entire employment history in the district."

4. All petitioners used sick leave legitimately.

5. The form letter dated May 26, 1988, and received by each petitioner, lists total absences for the 1987-88 school year; only sick leave and personal days actually were used as a basis for the salary increment withholding.

6. The spring 1987 conferences with Assistant Superintendent Marini regarding attendance were not disciplinary actions. The conferences were held to give each teacher an opportunity to discuss the reasons for his/her absences.

7. The amount of increment withheld for each petitioner is as follows:

Inez Bull	$3,885
Elizabeth Conelly	$3,829
Johnna DeCarlo	$4,049
Edward Dellert	$3,548
Rita Diehl	$3,183
Doris Kohl	$3,219
Isabel Marquez	$1,819
Linda McGuire-Gilhooly	$2,063
Lynette Potente	$3,377
Daniel Sciacchetano	$3,006
Tracey Summers	$5,696

8. Each petitioner remains one step behind other teachers with similar qualifications and experience on the district's salary guide, as a result of the challenged increment withholdings.

9. Assistant Superintendent Marini met in Spring 1987 with approximately 110 teachers regarding absences. The individuals summoned to these meetings were reviewed based solely on Marini's judgement that there might be an attendance problem. Teachers were summoned to these conferences based on the number of sick and personal days each had used over his/her entire career in respondent district.

10. Assistant Superintendent Marini did not indicate to petitioners, during the spring 1987 conferences, any goal for improvement in attendance or definition of excessive absence. The decision as to whether there had been sufficient improvement in 1987-88 to recommend a granting of the salary increment was based solely on the judgement of Marini.

11. The first reference to consistency of instruction or continuity of instruction as a problem caused by petitioners' absences was in the May 1988 form letter. Superintendent Marini's recommendations to withhold petitioners' salary increments for school year 1988-89 were based solely on the number of days that each petitioner was absent over his/her entire career in the respondent district.

12. Assistant Superintendent Marini did not make the final decision regarding salary increment withholdings. That decision was made by the Board of Education at its August 16, 1988 meeting. Marini presented the Board with the number of absences for each petitioner. He provided percentages if they were requested by the Board. The Board questioned Marini and conducted its deliberations in a private session. No minutes of those sessions were taken. Respondent has not shown that any factors other than the numbers of days absent were considered by the Board in making its determinations to withhold petitioners' salary increments.

13. Pursuant to the collective bargaining agreement between the Union City Board of Education and the Union City Education Association, Inc., covering the period September 1, 1986 through August 31, 1989, petitioners were entitled to ten paid sick days each school year. Unused sick leave accumulates from year to year with no maximum limit (Exhibit J-511.)

FINDINGS OF FACT AS TO SPECIFIC PETITIONERS

In addition, I **FIND** the following facts as to each individual petitioner:

Dr. Inez Bull: Dr. Bull has been employed by respondent as a music teacher since September 1959 (Exhibit J-473). Her use of sick days during the period of September 1959 through June 1983 is accurately listed in exhibit J-474.

Dr. Bull began the 1983-84 school year with 31 accumulated sick days and 2 personal days. During that school year, she used 15 sick days (Exhibit J-475).

In school year 1984-85, petitioner Bull used 10 of her 28 accumulated sick days. (Exhibit J-476.) During the school year 1985-86, she used 14 of her 30 accumulated sick days and 1/2 personal day (Exhibit J-477).

In school year 1986-87, she used 9 of her 27.5 accumulated sick days (Exhibit J-478). Seven of those sick days were taken in March as a result of an injury she suffered in a fall.

Bull does not recall meeting with Assistant Superintendent Marini in the spring of 1987 regarding her absences, nor does she recall receiving the May 26, 1988 letter from the Superintendent of Schools advising her that her attendance had become a "critical issue." Assistant Superintendent Marini testified that he met with petitioner Bull in the spring of 1987 to discuss her absences. I FIND that the meeting did take place.

In the following school year, 1987-88, petitioner used 12 of her 30.5 accumulated sick days and 1/2 personal day (Exhibit J-479). However, petitioner credibly testified that she made up all of her missed classes. Neither petitioner's principal, nor the assistant superintendent, nor any other district official met with petitioner regarding her absences between the Spring 1987 meeting and the end of the 1987-88 school year.

In February 1988, Superintendent Hannah acknowledged petitioner Bull's nomination for the Governor's Teacher Recognition Program (Exhibit P-481). The Board presented no evidence that petitioner Bull was not a good teacher, or that her absences negatively impacted her performance.

Petitioner Bull received the respondent's July 7, 1988 form letter advising her that he was recommending that her salary increment for the 1988-89 school year be withheld, and scheduling a meeting with her for July 26, 1988 to discuss the matter. (Exhibit J-470) Bull met with assistant superintendent Marini in July 1988. She attributed her absences during that school year to an injury to her hand and pneumonia. The Assistant Superintendent testified that Bull was a dedicated teacher.

Bull did not attend the August 16, 1988 Board meeting at which her salary increment withholding was approved because she was out-of-state on that date. No disciplinary action was taken against Bull for reasons of absences until the 1988-89 salary increment withholding.

Elizabeth Connelly: Petitioner Elizabeth Connelly has been employed by respondent since September 1971. Initially, she was employed as a teacher. Since 1979, she has been employed as a guidance counselor. Her attendance record from 1971-72 through 1982-83 is accurately listed in exhibit J-250.

In school year 1983-84, Connelly used 16 1/2 of her 17 1/2 accumulated sick days and one personal day (Exhibit J-245). In 1984-85, she used 6 of her 12 accumulated sick days and 1 personal day (Exhibit J-246). In 1985-86, she used all 17 of her accumulated sick days and her 2 personal days (Exhibit J-247). In 1986-87, Connelly used 6 1/2 of her 10 sick days and her 2 personal days (Exhibit J-248). In 1987-88, she used 11 of her 13 1/2 accumulated sick days and 1 personal day (Exhibit J-249).

Connelly's evaluations during school years 1983-84 (Exhibit P-251); 1984-85 (Exhibit P-252); 1985-86 (Exhibit 253); and 1986-87 (Exhibit P-254), were all outstanding or above average.

Connelly's October 1987 evaluation rates her punctuality as outstanding. However, it also notes in the Personal Improvement Plan (PIP) section that "attendance will be reviewed in 90 days per superintendent's instructions" (Exhibit P-254.) No such review ever occurred. Her February 1988 evaluation again noted that attendance would "be reviewed per superintendent's instructions." (Exhibit P-255.) Again, no such review occurred.

In April 1987, petitioner received a form letter from respondent scheduling a May 8, 1987 conference with Assistant Superintendent Marini to discuss "your continued performance problems, specifically your attendance." (Exhibit P-243.) Petitioner met with the assistant superintendent, superintendent and a union representative on May 5, 1987, in response to this letter. She was told that she was called into the meeting because her absences had exceeded 85% of the leave time alloted to her over her entire tenure in the District. She provided explanations for her absences. She was told that her attendance would be reviewed in 90 days. No such review ever occurred. Connelly had no further meetings with the assistant superintendent, superintendent or her supervisor or principal during the 1986-87 or 1987-88 school years.

On May 26, 1988, petitioner received a form letter from the superintendent advising her that her attendance had become a critical issue. The letter showed 12 total absence days for the 1987-88 school year and stated "consistent instruction necessary for the students cannot be provided in this circumstance." Petitioner Connelly was not assigned to any instructional positions during the 1987-88 school year—she was a guidance counselor.

On May 27, 1988, petitioner sent a response to the assistant superintendent concerning the series of letters she had received regarding her attendance. She noted that she had received outstanding evaluations during the period in question, had provided explanations for her absences and raised concerns about "mixed signals" being sent to her by the District. She noted that no substantive criticisms of her performance had been

received from the District, yet, she was receiving letters indicating that her performance was being negatively affected by her attendance (Exhibit J-241.) No response was sent to petitioner by Assistant Superintendent Marini.

On July 7, 1988, petitioner was sent a form letter advising her that a salary increment withholding was being recommended because of her attendance and setting up another conference with the District's administration (Exhibit J-239.) That conference occurred on July 26, 1988, after the end of the 1987-88 school year. Two union representatives, the assistant superintendent, petitioner, and her husband attended the meeting. At the meeting, the assistant superintendent related the review of her absences to the fact that the District was undergoing State monitoring.

Connelly attended the August 16, 1988 Board meeting at which her salary increment withholding was approved. She testified that, in the portion of the meeting which she was permitted to observe, the Assistant Superintendent Marini presented to the Board her days of absence and recommended that her increment be withheld.

Connelly credibly testified that no continuity of instruction concern was raised with her until that language appeared in the May 26, 1988 form letter (Exhibit J-242.) The only prior disciplinary action imposed on petitioner Connelly relating to her attendance was on June 2, 1986, when she was docked one day's pay for her absence on May 15, 1986, which exceeded her allotted sick leave. (Exhibit J-240)

Johnna DeCarlo: Petitioner Johnna DeCarlo has been employed by respondent since September 1964. She has taught science, English, early childhood and reading. She has been a general elementary teacher for the last three years. Her record of sick day utilization for 1972 through June 1983 is listed on exhibit J-223.

DeCarlo's evaluations of February 1982 (Exhibit P-225); March 1982 (Exhibit P-226); January 1983 (Exhibit P-227); and January 1984 (Exhibit P-228), were outstanding and did not note any attendance problems.

In the school year 1984-85, petitioner used all of her accumulated sick days (Exhibit J-218.) Her February 1985 evaluation noted that her attendance was unsatisfactory and needed improvement (Exhibit P-229.) Her January 1984 evaluation noted 5 days absent but did not indicate that any improvement was needed (Exhibit P-228.) Her performance during this school year was outstanding.

In school year 1985-86, petitioner used all of her 11 accumulated sick days and 2 personal days (Exhibit P-219.) Her February 1986 evaluation noted 10 absent days to that date, but did not indicate that improvement was needed (Exhibit P-230.) Her performance was rated outstanding.

In school year 1986-87, petitioner used 8 of her 10 accumulated sick days and 2 personal days (Exhibit J-221.) Her June 1987 evaluation noted that improvement was needed in punctuality and attendance (Exhibit P-231.) The specific reference in the evaluation was to punctuality. Petitioner's instances of lateness during that school year were caused by construction occurring near the school building she was assigned to, making it difficult for her to park her car and get into the building on time. Despite these instances of lateness, her performance during this school year was outstanding.

In April 1987, DeCarlo met with Assistant Superintendent Marini regarding her absences. A union representative and the superintendent also attended that meeting which occurred following her receipt of a form letter dated March 31, 1987, raising concerns about her attendance (Exhibit J-216.) DeCarlo credibly testified that she asked at that meeting why she was being reviewed, and was told by Marini that it related to State monitoring.

During the 1987-88 school year, DeCarlo had no meetings with any school or district official regarding her attendance. After her receipt of a form letter, dated May 26, 1988, indicating that her attendance had become a "critical issue," and raising

concerns about consistent instruction, she prepared a hand written response which explained all of her absences during the 1987-88 school year (Exhibit J-15.) During that school year, DeCarlo used 5 1/2 of her 13.5 accumulated sick days and 2 personal days, an improvement over the previous year (Exhibit J-222.) Her performance during that school year was, again, rated outstanding. Her evaluation dated November 1987 rated her punctuality and attendance above average (Exhibit P-232.)

On July 12, 1988, DeCarlo met with Assistant Superintendent Marini and a union representative regarding her absences as instructed in a form letter she received dated July 7, 1988 (Exhibit J-213.) Marini had not received any complaints about her performance or attendance from her supervisor. No disciplinary action had been imposed on DeCarlo during her 24 years as a teacher in Union City, until the 1988-89 salary increment withholding.

DeCarlo did not attend the August 1988 Board meeting at which her salary increment withholding was approved because she did not receive the letter advising her of the meeting until September 1988. She was away for the summer and had not left a summer address with respondent. She testified that she would have attended the Board meeting if she had known about it.

In September, after her increment withholding had been approved, DeCarlo wrote an extensive response to the form letter she had received dated August 3, 1988, which purportedly summarized prior meetings that had occurred between her and district officials. (Exhibit J-211.) She challenged the accuracy of the form letter. None of DeCarlo's evaluations indicated any performance problem.

Edward Dellert: Edward Dellert has taught in respondent school system since September 1969. He was on personal leave from March 1984 through February 1985. Initially, he was employed as a 6th grade teacher. Since 1985, he has been a computer resource teacher. He is also assigned to computer duties at the Central Board of Education Office one day a week. His attendance record from September 1969 through June 1983 is listed in Exhibit J-408.

In school year 1985-86, Dellert used 15 of his 18.5 accumulated sick days and 1 personal day (Exhibit J-411.) His December 1985 evaluation did not note any attendance problems. However, his March 1986 Annual Performance Report indicated that attendance was an area that needed improvement (Exhibit P-417.) His Personal Improvement Plan (PIP) in that evaluation review called for monitoring and a conference regarding his attendance. His performance during that school year was above average.

In school year 1986-87, Dellert used 9 1/2 of his 14 1/2 accumulated sick days and 2 personal days (Exhibit J-412.) His December 1986 evaluation rated his punctuality and attendance as satisfatory (Exhibit P-418.) His performance was, again, above average.

In March 1987, Dellert met with Assistant Superintendent Marini, Superintendent Hannah and a union representative. He was told that the meeting was held because he had been absent more than 7 days. Dellert provided reasons for his absences and was told that his attendance must improve.

In school year 1987-88, Dellert used 8 of his 15 accumulated sick days and 1 personal day (Exhibit J-413.) On his January 1988 evaluation, his punctuality and attendance were rated as satisfactory and no PIP for attendance was prescribed. (Exhibit P-419.) His March 1988 Annual Performance Report did not indicate any attendance problem. His performance during this school year was outstanding.

During the 1987-88 school year, Dellert did not have conferences or meetings with his principal regarding his attendance. His only meeting with a district official in this regard occurred in July 1988, after the school year had ended. During that meeting, Dellert attributed many of his absences that year to high blood pressure, stress and the medication he was taking to correct those conditions.

Dellert operated a part-time computer programming business out of his home. He credibly testified that he did not schedule appointments for that business during school hours.

Dellert attended the August 1988 Board of Education meeting at which his salary increment withholding was approved. He observed that portion of the meeting in which Marini presented his number of days absent per year to the Board. He was not present for the Board's deliberations on the matter.

No disciplinary action had been taken against Dellert for attendance problems prior to the 1988-89 salary increment withholding. He acknowledged receiving the form letters sent to all petitioners by respondent. The May 1988 letter (Exhibit J-405) was the first mention by the District of any concern regarding "consistent instruction" relating to his attendance.

Rita Diehl: Rita Diehl has been employed by respondent as a teacher in the business department since September 1963. Her attendance record from September 1963 to June 1983 is indicated in exhibit J-62.

In school year 1983-84, Diehl used 18 of her 25 accumulated sick days and no personal days (Exhibit J-57.) Her April 1984 evaluation rated her punctuality and attendance as satisfactory; her performance ratings were from satisfactory to outstanding (Exhibit P-66; P-67.)

In school year 1984-85, she used all 19 of her accumulated sick days and her two personal days (Exhibit J-58.) The only explanation she gave for any of those absences was that her father passed away in November 1984. She testified that she thought she had used funeral leave during that time but her official record shows no use of such leave, and 8 sick days used that month (Exhibit J-58.) Her December 1984 evaluation rated her punctuality and attendance as satisfatory. Her May 1985 performance report (Exhibit P-69) noted that "administration considers 7 or more absence (sic) as excessive-5 of above

days absence were due to funeral-2 were personal. The remaining days are due to a medical problem that will be taken care of during the summer time off." (Exhibit P-69.) Her performance ratings for this school year were satisfactory to outstanding.

In school year 1985-86, petitioner used all 10 of her accumulated sick days and 2 personal days. Her performance ratings remained satisfactory to outstanding, and no attendance problems were noted (Exhibits P-70; P-71).

In school year 1986-87, Diehl again used all 10 of her accumulated sick days. (Exhibit J-60.) Her December 1986 evaluation rated her punctuality and attendance as satisfactory and included no PIP for attendance (Exhibit P-72.) Her performance during this school year remained satisfactory to outstanding.

In May 1987, Diehl met with Assistant Superintendent Marini and a union representative regarding her absences. She attributed her absences to high blood pressure and dental problems. Diehl was told at this meeting that her attendance had to improve during the next school year.

During the 1987-88 school year, Diehl did not have any meetings or discussions with her chairperson or principal regarding her attendance. In school year 1987-88, she used 10 of her 11 accumulated sick days (Exhibit J-61.) Her December 1987 evaluation rated her punctuality and attendance as satisfactory and there was no PIP for attendance. (Exhibit P-74.) Her performance ratings were satisfactory to outstanding.

On July 13, 1988, Diehl met with Marini and two union representatives regarding her attendance. She again discussed the reasons for her absences and attributed many of them to her blood pressure and dental problems. She received the form letters sent to all petitioners in this matter. No reference was made to problems with the continuity of her instruction being affected by her attendance until the May 1988 form letter. (Exhibit J-55.)

Diehl attended the August 1988 Board of Education meeting at which her salary increment withholding was approved. She left the meeting at 11:00 p.m. before they had reached her case on the agenda.

Doris Kohl: Doris Kohl has been employed by respondent school district since September 1953. She has been continuously employed as a business teacher with the exception of the period from February 1959 through September 1962, when she was on maternity leave. Her attendance from September 1962 through June 1983 is listed in exhibit J-315.

For school year 1983-84, Kohl used all 11 of her accumulated sick days. (Exhibit J-316.) Several of those days were used for religious observances. Her October 1983 evaluation rated her punctuality and attendance as outstanding. Her March 1984 Annual Performance Report does not mention attendance as an area needing improvement. (Exhibit P-326.) Her performance during this school year was rated outstanding.

In school year 1984-85, Kohl used 11 of her 12 accumulated sick days. (Exhibit J-317.) No evaluations were submitted for this school year.

In school year 1985-86, Kohl used 8 of her 13 accumulated sick days and 1.5 of her two personal days (Exhibit J-318.) Her November 1985 evaluation rated her punctuality and attendance as above average (Exhibit P-327.) Her Annual Performance Report of March 1986 noted 6 absences but made no comments and did not indicate that attendance was an area needing improvement. (Exhibit P-328.) Her performance during this school year was again rated outstanding.

In school year 1986-87, Kohl used 7 of her accumulated 15.5 sick days and her 2 personal days (Exhibit J-319.) Her October 1986 evaluation rated her punctuality and attendance as outstanding (Exhibit P-329.) Her March 1987 Annual Performance Report listed 7 absences but made no comment and did not indicate that attendance was an area needing improvement (Exhibit P-330.) Her performance this school year continued to be outstanding.

Kohl met with her principal during the 1986-87 school year to discuss her observances of Jewish holidays in September. The principal told her that, because of State monitoring, she should "do something" about her absences for religious reasons. No specific directives were issued by the principal.

In May 1987, Kohl met with Assistant Superintendent Marini and the superintendent regarding her attendance. Marini told her that her absences were being reviewed because of State monitoring.

During the 1987-88 school year, Kohl did not have any discussions with, or receive any documents from, her principal or chairperson regarding her attendance. During that school year, she used 8 of her 18.5 accumulated sick days and both of her personal days (Exhibit J-320.) Her punctuality and attendance were rated above average. Her performance was rated outstanding. Her evaluations did not indicate any need for improvement in attendance.

Kohl received the May 26, 1988 form letter regarding her attendance. (Exhibit J-312.) Kohl wrote a response to that letter, dated June 9, 1988, which broke down her various absences during that year, including religious holidays. Kohl then met with Assistant Superintendent Marini in July 1988. A union representative also attended that meeting. At the meeting, she gave reasons for her absences for her entire 32-year career, as she could recall. She did not attend the August 1988 Board meeting at which her salary increment withholding was approved.

No disciplinary action was taken against Kohl for her attendance prior to the salary increment withholding for 1988-89. The form letters were the only expressions of concern about the consistency of her instruction being affected by her attendance.

Isabel Marquez: Isabel Marquez has been employed by respondent since 1983. She was a substitute teacher until January 1985, when she began working under contract as

a Spanish teacher.

In school year 1984-85, Marquez used 3.5 of her 5 accumulated sick days and 1 of her 2 personal days (Exhibit J-184.) Her March 1985 evaluation rate her punctuality and attendance as above average (Exhibit P-191.) Her Annual Performance Report of May 1985 noted 1 1/2 absent days in her PIP. No other comments were made regarding attendanc. (Exhibit P-192.) Her performance during this school year was satisfactory.

In school year 1985-86, Marquez used 6 of her 12.5 accumulated sick days and her 2 personal days (Exhibit J-185.) Her October 1985, January 1986 and March 1986 evaluations all rated her punctuality and attendance as above average. (Exhibits P-193, P-194, P-195.) Her May 1986 Annual Performance Review noted 8 absences in her Professional Improvement Plan. No other comments were made regarding her absences. (Exhibit P-196) Her performance was satisfatory.

In school year 1986-87, Marquez used 11 of her 16.5 accumulated sick days and both of her personal days (Exhibit J-186.) Her October 1986, December 1986 and March 1987 evaluations rated her punctuality and attendance above average. (Exhibits P-197, P-198, P-199.) Her Annual Performance Report noted 11 absences in her PIP. No other comments regarding her attendance were included in the report (Exhibit P-200.) Her performance was satisfactory to above average.

Petitioner met with Assistant Superintendent Marini and a union representative on May 10, 1987, regarding her attendance. She attributed her absences to allergies and menstruation. Marini told Marquez at this meeting that her attendance must improve. He did not raise any concerns other than her number of absences.

In school year 1987-88, Marquez used all 15.5 of her accumulated sick days and 1.5 of her 2 personal days (Exhibit J-187.) During that school year, Marquez did not discuss her attendance with Marini, her principal, or chairperson, nor did she receive any

correspondence regarding her attendance. Her October 1987 and December 1987 evaluations rated her punctuality and attendance as above average. Her February 1988 evaluation rated her punctuality and attendance satisfactory. (Exhibit P-201, P-202, P-203.) In her Annual Performance Report of May 1988, 14.5 absences were noted in the PIP, but no other comments were made (Exhibit P-204.) Her performance during this school year improved to above average, despite her absences.

In July 1988, Marquez met with Marini regarding her attendance. She again explained the reason and indicated that she had provided written confirmation of her medical problems. Marini indicated that he did not have those notes with him but that they were in another file. Problems with the continuity of her instruction because of her attendance were first raised with Marquez in the May 1988 form letter. (Exhibit J-180)

Linda McGuire-Gilhooly: Linda McGuire-Gilhooly has been employed as an elementary school teacher by respondent since September 1974. She was on maternity leave from December 1979 to February 1981, and from February 1989 through and including the time of the hearing in this matter. Her absences from September 1974 through June 1983 are listed in exhibit J-433.

In school year 1984-85, McGuire-Gilhooly used 10.5 of her 17 accumulated sick days and 1 of her two personal days (Exhibit J-435.) Her March 1985 evaluation noted 8 days absent and indicated that improvement in her attendance was needed (Exhibit P-444.) Her performance during that school year was above average to outstanding. In 1984-85, petitioner was also absent 25 days on Workers' Compensation due to a work-related injury. (Exhibit J-435.)

In school year 1985-86, McGuire-Gilhooly used all 17.5 of her accumulated sick days and her two personal days (Exhibit J-436.) Most of her absences in 1985-86 were attributable to an October car accident in which she was injured. Her February 1986 evaluation noted 18 absent days, but prescribed no PIP for attendance (Exhibit P-445.) Her

performance in that school year was outstanding.

In school year 1986-87, McGuire-Gilhooly used 7 of her 10 accumulated sick days and one of her 2 personal days (Exhibit J-437.) Her March 1987 evaluation noted 9 absent days, but prescribed no PIP (Exhibit P-446.) In October 1986, she was involved in another auto accident which required her to use sick days. Her performance, again, was outstanding.

In spring 1987, McGuire-Gilhooly met with Marini regarding her absences and reviewed the reasons for them. Marini told her that her attendance had to improve.

In school year 1987-88, McGuire-Gilhooly used 7.5 of her 14 accumulated sick days and her 2 personal days (Exhibit J-439.) Her April 1988 evaluation rated her punctuality and attendance as satisfactory (Exhibit P-447.) In addition to her sick leave, petitioner was absent on June 13, 14, 15, 16, and 17, 1988, due to her marriage. (Exhibit J-439, J-440.) Her performance remained outstanding.

In July 1988, McGuire-Gilhooly met with Marini and a union representative regarding her attendance. Marini told her that her absences were "excessive," and she again explained the reasons.

She did not attend the August 1988 Board meeting at which her salary increment withholding was approved because she felt that she had adequately explained her absences to Marini and she did not believe that her increment was in jeopardy. She received all of the form letters mailed to the petitioners.

Lynette Potente: Lynette Potente has been employed by respondent since November 1971. She has taught English and reading and has been an English as a Secondary Language (ESL) teacher since 1985. Her record of absences from November 1971 through June 1983 appears in exhibit J-40.

During school year 1983-84, Potente used all 10 of her accumulated sick days and her 2 personal days. In addition, she was on maternity leave from February 1984 to September 1984 (Exhibit J-35.) Her October 1983 evaluation rated her punctuality and attendance as above average (Exhibit P-44.) Her performance was above average during that school year.

In school year 1984-85, Potente again used all 10 of her accumulated sick days and 2 personal days (Exhibit J-36.) No performance evaluations were submitted for that school year.

In school year 1985-86, Potente again used all 10 of her accumulated sick days and her two personal days (Exhibit J-37.) All 10 of the sick days were used because of the birth of her son in September 1985. She was then on maternity leave from October 1985 to December 1985.

In school year 1986-87, she again used all 10 of her sick days and 1 of her 2 personal days (Exhibit J-38.) Her evaluation of October 1986 rated her punctuality and attendance as above average (Exhibit P-45.) Her March 1987 performance report did not indicate any attendance problem (Exhibit P-46.) Her performance during that school year was above average to outstanding. During the 1986-87 school year, Potente met with her principal regarding her attendance. She was told that she had used a high percentage of her available days over her career. She attributed most of her absences to two maternity leaves and two auto accidents. No reference to discontinuity of instruction was made.

In spring 1987, Potente met with Assistant Superintendent Marini regarding her attendance, and explained the reasons for them. Again, no problem other than the sheer number of her absences was cited. Exhibit J-33 is the letter that called for that meeting.

In school year 1987-88, Potente used all 11 of her accumulated sick days and one of her personal days (Exhibit J-39.) Her October 1987 evaluation rated her punctuality and attendance above average (Exhibit P-47.) Her March 1988 Annual Performance Report did not list attendance as a problem area (Exhibit P-48.) Her performance that year was above average to outstanding.

In July 1988, Potente met with Marini and a union representative regarding her attendance, and again explained the reasons. Among the reasons was one sick day which she was charged for leaving her school building following a fire. She said that she left the building because it was too smokey after the fire. She was told that that absence would not be counted. Her attendance report form has a handwritten notation indicating the sick days used were 10 and not 11 due to a "tar roof condition." (Exhibit J-39) None of Potente's evaluations noted any problem with continuity of instruction or any attendance problems. Her attendance was consistently rated as above average. She did not attend the August 1988 Board meeting at which her salary increment withholding was approved. No disciplinary action was ever imposed on petitioner due to her absences until the challenged salary increment withholding.

Daniel Sciacchetano: Daniel Sciacchetano has been employed by respondent since September 1974 as a physical education teacher. His attendance record from September 1974 to June 1983 is listed in exhibit J-9.

In school year 1983-84, Sciacchetano used 11.5 of his 14.5 accumulated sick days and both of his personal days (Exhibit J-10.) His October 1983 evaluation rated his punctuality and attendance as satisfactory (Exhibit P-16.) His February 1984 Annual Performance Report did not list attendance as a problem area (Exhibit P-17.) His performance that school year was satisfactory.

In school year 1984-85, Sciacchetano used 11.5 of his 13 accumulated sick days and both of his personal days (Exhibit J-12.) His October 1984 evaluation rated his punctuality and attendance as satisfactory. His March 1985 Annual Performance Review did not list attendance as a problem area (Exhibit P-19.)

In school year 1985-86, Sciacchetano used 6 of his 11.5 accumulated sick days and both of his personal days (Exhibit J-13.) His October 1985 evaluation rated his punctuality and attendance as satisfactory. His January 1986 Annual Performance Report did not list attendance as a problem area (Exhibit P-21.) Again, his performance was satisfactory.

In school year 1986-87, Sciacchetano used all 15.5 of his accumulated sick days. (Exhibit J-14.) His October 1986 evaluation rated his punctuality and attendance as above average. (Exhibit P-22) His December 1986 Annual Performance Report did not list attendance as a problem area. (Exhibit P-23) His performance remained, generally, satisfactory. In May 1987, Sciacchetano met with Assistant Superintendent Marini regarding his attendance. Marini told him at that time that his attendance had to improve or his increment would be withheld. Only the sheer number of his absences was cited as a problem. Sciacchetano testified that he was only absent 10 days in 1986-87 but presented no proofs. I FIND that he was absent 15.5 days that year as reported in exhibit J-14.

In school year 1987-88, Sciacchetano used 6.5 of his 12 accumulated sick days. (Exhibit J-15.) His October 1987 evaluation rated his punctuality and attendance as above average. (Exhibit P-24) His February 1988 Annual Performance Report did not list attendance as a problem area (Exhibit P-25.) His performance was above average. On July 28, 1988, Sciacchetano met with Marini and a union representative regarding his absences. He did not recall receiving the letter setting up this meeting (Exhibit J-5.) He testified that he was told of this meeting by a telephone call. At the meeting, he attributed his absences to illnesses and personal family problems. Sciacchetano's attendance improved from 1986-87 to 1987-88. Nothwithstanding that fact, Marini recommended that his increment be withheld. Marini testified that, in his opinion, only

perfect or near perfect attendance by Sciacchetano in 1987-88 would have prevented the recommendation that his increment be withheld. Sciacchetano's evaluations during that year, exhibits P-24 and P-25, rated his performance as above average to outstanding and made no mention of continuity of instruction problems or performance problems. Sciacchetano did not attend the August 1988 Board meeting at which his salary increment withholding was approved.

Tracey Summers: Tracey Summers has been employed by respondent since February 1974. She is a speech therapist. Her absences from 1974 through June 1983 are listed in exhibit J-136. Many of petitioner's absences in 1980-81 and 1982-83 were attributed to her undergoing cancer treatment and to a work-related injury. In 1982, a table fell on her foot while she was chaperoning a school dance.

In school year 1983-84, Summers used all 12 of her accumulated sick days and two personal days. (Exhibit J-131)

In school year 1984-85, she used 5.5 of her 10 accumulated sick days and 1.5 of her 2 personal days (Exhibit J-132.) Her March 1985 evaluation and Annual Performance Reports both note that her attendance needs improvement. (Exhibit P-141, P-142.)

In school year 1985-86, Summers used 8 of her 15 accumulated sick days and .5 of her 2 personal days (Exhibit J-133.) Her January 6, 1986 evaluation rated her punctuality and attendance as above average. (Exhibit P-143.) Her March 1986 Annual Performance Report did not note attendance as an area needing improvement (Exhibit P-144.) Her performance during that school year was outstanding.

In school year 1986-87, Summers used 10.5 of her 18.5 accumulated sick days and her two personal days (Exhibit J-134.) Her December 1986 evaluation rated her punctuality and attendance as satisfactory but noted her 5 days absent. No PIP was

prescribed for attendance (Exhibit P-145.) Her performance was satisfactory to outstanding.

In March 1987, Summers met with Assistant Superintendent Marini regarding her attendance. She explained her various illnesses, particularly her cancer, as the reasons for many of her absences.

In 1987-88, Summers used 9 of her 18 accumulated sick days and 1 of her 2 personal days (Exhibit J-135.) Her October 1988 evaluation rated her punctuality and as attendance above average (Exhibit P-146.) Her March 1988 Annual Performance Report did not indicate any problem with attendance (Exhibit P-147.) Neither report indicated any performance problems or problems with continuity of instruction.

On July 12, 1988, Summers met with Marini and a union representative regarding her attendance. Again, they discussed her various illnesses.

Summers attended the August 1988 Board meeting at which her increment withholding was approved, but was not allowed to speak. No disciplinary action was imposed on Summers for her absences prior to the 1988-89 salary increment withholding.

LEGAL ANALYSIS AND CONCLUSIONS

N.J.S.A. 18A:29-14 provides: "Any board of education may withhold, for inefficiency or other good cause, the employment increment. . . of any member in any year by a recorded roll call majority vote of the full membership of the board of education."

The legal issue to be considered in the present case is whether the respondent acted properly in withholding the petitioners' salary increments for school year 1988-89, based on its subjective determination that they were excessively absent from school. Specifically, the Board asserted, in an August 18, 1988 form letter to all petitioners, that: "The reason for [the salary increment withholding] was your poor attendance during the last two school years, as well as a consideration of your entire employment history in the district. In considering the recommendation [to withhold the increment], the Board took into account all mitigating circumstances brought to the Administration by you or your representative in meetings with administrative staff."

The decision to withhold an increment is a matter of essential managerial prerogative which has been delegated by the Legislature to local Boards of Education. Board of Education of Bernards Township v. Bernards Township Education Association, 79 N.J. 311, 321, (1979). Thus, a board's decision to withhold an increment cannot be overturned unless it is determined to have been patently arbitrary, without a rational basis or induced by improper motives. See, Kopera v. West Orange Borad of Education, 60 N.J. Super. 288, 294 (App. Div. 1960). The burden of proving the unreasonableness of a board's actions is on the challenging party. [Id. at 297.]

In Burlington Education Association v. Burlington City Board of Education, OAL DKT. NO. 5114-84 (OAL May 16, 1985), aff'd Commissioner of Ed. (July 1, 1985), aff'd State Board (November 8, 1985), the Commissioner of Education held that individual absenteeism policies are a matter of local determination and should provide for a case-by-case review. Thus, the Burlington City Board's policy of automatically issuing warnings to teachers who exceeded an established standard was struck down as an arbitrary exercise of administrative discretion.

The Burlington decision followed the principles established in two prior cases: Montville Township Education Association v. Montville Board of Education, OAL DKT. NO. EDU 8247-83 (February 29, 1984), rejected, Commissioner of Education (April 16,

1984), rev'd State Board (Nov. 7, 1984) rev'd (N.J. App. Div., Dec. 6, 1985, A-1178-84T7) (unreported); and Kuehn v. Teaneck Bd. of Ed., 1981 S.L.D. 1290, rev'd Comm'r of Ed., 1981 S.L.D. 1299, rev'd State Board (Feb. 1, 1983).

In Kuehn, the petitioner was denied a salary increment by the respondent because she was absent more than 90 school days in one year. The respondent relied upon an unwritten policy which provided that any staff member who was absent more than 90 school days in a year was ineligible for a salary increment. In overruling the respondent's action, the State Board stated:

> To simply state that a teacher by sheer number exceeds the 90 day maximum allowance for absence and forfeits an increment, without considering the particular circumstances for absence is not good cause for the withholding of increment as required by N.J.S.A. 18:29-14. For the Teaneck Board to determine that petitioner's absence exceeding 90 days, in and of itself, is sufficient reason for the withholding of increment, without consideration of the particular circumstances for the absence, is arbitrary and without demonstrated rational basis. [Id. at 4.]

In Montville Township Education Ass'n v. Montville B.O.E., the respondent board adopted teacher attendance guidelines for the purpose of improving overall teacher attendance. Those guidelines correlated the number of days absent with ratings of satisfactory, needs improvement or unsatisfactory. The guidelines also required the inclusion of a narrative explanation to be placed in the comment section of the teacher's yearly summary evaluation. The Appellate Division, in reversing the State Board's decision upholding the guidelines, stated:

> We are satisfied that the record does not support the State Board's finding that the evaluation system as presently constructed does take legitimate illnesses into proper account. We so conclude because irrespective of

> the narrative information which may be included in the evaluation report, the simple fact remains that the assigned rating is a merely mathematical consequence and unaffected by the reason for the absence. A rating so assigned is, in our view, arbitrary. We are therefore persuaded that the local board's action is indeed unreasonable [citation omitted].
>
> At the outset we note that petitioner do not contest either the significance of good staff attendance in achieving quality education or the right of a local board to include attendance as a component in the evaluation of overall performance. Their contention is, simply, that a board may not "mark down" a staff member's performance based on his recourse, when he is ill or disabled, to a statutorily provided sick leave. We agree both with this contention and the Commissioner's response to it. [Id. at 4-5.]

These decisions do not stand for the proposition that a school board may never rely on an attendance standard. Instead, these cases hold that a school board may not rely solely on an arbitrarily arrived at figure in making a determination of what constitutes excessive absenteeism in a particular case. Cases of excessive absenteeism must be resolved on a case-by-case basis.

It is clear that excessive absenteeism is good cause for withholding an employee's increment. Trautwein v. Board of Education of Bound Brook, 1978 S.L.D. 445, aff'd State Board 1979 S.L.D. 876, rev'd per curiam 1980 S.L.D. 1539 (N.J. App. Div.) certif. den. 84 N.J. 469 (1980); Angelucci v. West Orange Board of Education, 1980 S.L.D. 1066, aff'd Comm'r of Ed., 1980 S.L.D. 1077, aff'd State Board 1981 S.L.D. 1386.

In Trautwein, the Bound Brook Board of Education decided to withhold the increment of a teacher who had been absent 238 1/2 days between 1964 and 1976, despite

the fact that the teacher's performance was consistently rated from excellent to good and the teacher's absences were found to be legitimate. The Commissioner reversed the action of the local board, and his decision was upheld by the State Board. The local board's decision was reinstated by the Appellate Division which commented:

> It is clear to us that we have here no more than a difference of opinion between the local board and the State Board on whether, in the circumstances, the teacher's absences . . . warranted the withholding of the increment. Such divergence, in our view, is an insufficient basis for affirming the commissioner's reversal of the local board's decision. There was no determination that the board's decision was arbitrary or unreasonable or in any way constituted an abuse of the board's legislatively vested discretion in the matter. 1980 S.L.D. at 1542.

The problem presented in the instant case is whether or not respondent considered each petitioner's circumstances, or withheld their increments based only on their number of days absent. Petitioners allege that respondent applied its policy in a mechanistic fashion and decided to withhold their increments based on their number of absences. There is no allegation in this case that any of the petitioners exceeded their allotted sick leave except in one instance, and that petitioner (Connelly) was docked 1 day's pay for exceeding her allotment.

In Neptune Township Education Association vs. Board of Education of the Township of Neptune OAL DKT. NO. EDU 4432-88 (May 25, 1989), Commissioner's Decision (July 10, 1989), the Commissioner of Education held that "Absences, even legitimate ones, are not immune from disciplinary action being taken by a Board of Education seeking to deter the harmful or deleterious effect of excessive absences on the continuity of instruction being provided to its students." Commissioner's Decision, at 12. The Commissioner went on to say "A board of education is not permitted, however, to take disciplinary action against the staff member unless it has taken into consideration the nature of the illness and has not relied on sheer number of days for its action."

In Vonita Smith vs. Board of Education of the City of Trenton, Mercer County OAL DKT. NO. EDU 5255-88 (March 6, 1989), Commissioner's Decision (April 18, 1989), the Commissioner of Education held that a Board of Education must consider: (1) the nature of illnesses and not just the number of days absent; and (2) the impact of the absences on the continuity of instruction, before withholding a salary increment. The Commissioner further said "What is necessary to demonstrate, however, is that the concern for continuity of instruction was specifically conveyed to the staff members during the period in which the excessive absenteeism was occurring, not merely at the end of the line of a series of fill in the blank memos." Commissioner's Decision at 17. That is exactly what happened in this case. The Board of Education conducted individual conferences with the petitioners in 1987. Those conferences gave the petitioners an opportunity to state the reasons for their absences. None of those reasons were contested, either at the conferences or in testimony presented by respondent at the hearing in this matter. Petitioners were told at those conferences that their attendance had to improve. No improvement goal was set forth. The assistant superintendent never defined "excessive" absenteeism. When asked to explain how he identified the teachers whose attendance he was reviewing, the assistant superintendent testified that he used his judgement and years of experience. That vague assertion was the closest thing to a definition of excessive absenteeism to come out in this record.

The next conference with petitioners in this regard occurred in July 1988, after the conclusion of the next school year. There was no discussion with the petitioners during the period of absenteeism, that is, during the 1987-88 school year. The conference in July was a precursor to the Board meeting of August 1988 at which the increment withholdings were approved. Obviously, no improvement could occur between July 1988 and the August 1988 Board meeting, because school was not in session.

I **CONCLUDE** that there was no true consideration of the reasons for the absences in this case. The absences in this case were within statutory and contractual

limits. Petitioners presented evaluations and credible testimony supporting their assertions that there was no educational harm or discontinuity of instruction caused by their absences. In answer to the prima facie case put forth by the petitioners, respondent made no showing of discontinuity of instruction or any performance problems caused by the absences.

Further, the Board made no showing of illegitimate use of sick leave by any petitioners. The form letters sent to petitioners, in some instances, did not even accurately reflect the particular petitioner's circumstances. No reference was made to the reasons given for the absences, no goals for improvement were provided, no intermediate steps for monitoring each teacher's attendance was given. In sum, the District's process was total boilerplate. Webster's Ninth New Collegiate Dictionary defines boilerplate as: "standardized formulaic or hackneyed language." This accurately describes the District's series of form letters. The letters do not establish that consideration was given to the reasons for each teacher's absences, and no showing was made that there was any negative impact on the continuity of instruction provided by the teachers. When prior administrative and court decisions required that Boards consider the particular circumstances of each absence, they did not mean that the District merely had to give the teacher the opportunity to state the reasons. The obligation of the Board was to scrutinize those reasons and determine whether the reasons were legitimate. If the reasons were legitimate, and the number of absences did not exceed the statutory and contractual allotment of sick leave earned by the teacher, then a Board's decision to withhold the salary increment could only be based on a determination that the absences interfered with the continuity of the instruction provided. No such determination was made here.

Petitioners made a prima facie case that their use of sick and personal days was legitimate, that the usage did not exceed their allotment, and that respondent did not

raise concerns about continuity of instruction during the period of the absences. Respondent was then required to answer that prima facie case with credible evidence. In that regard, they failed. They have not shown that they gave any substantive consideration to the reasons for the absences, nor have they shown that the absences were illegitimately used, nor have they shown that there was any discontinuity of instruction. The mere injection of catch phrases like "continuity of instruction" and "consistency of instruction" into form letters does not satisfy the requirements of the law in this regard. More than mere lip service is required. Yet, nothing was shown by the Board. Therefore, I CONCLUDE that their action was arbitrary, capricious and unreasonable.

Respondent argues that, because not every teacher who was initially reviewed in 1987 ultimately had his/her increment withheld, that proves the review was substantive and not arbitrary. Yet the testimony of Joseph Marini, the assistant superintendent who was singularly responsible for the administrative process which led to the Board's action, is most damaging to respondent's case.

Marini testified that at the August 1988 Board meeting, he gave the Board of Education raw numbers of days absent for each petitioner and answered any quetions posed to him. When asked to explain why form letters were used in this process when each teacher presented individual circumstances, he responded that he had obtained the letters from the New Jersey Association of School Administrators and, therefore, he assumed that their use was appropriate without tailoring them to individual staff member's circumstances. He further testified that he used a form letter "to be fair, to have some semblance of what we do for one, we do for another." That statement flies in the face of any assertion of individual review and determination. Fairness and uniformity have different meanings in the context of this case. Further, when asked if the reasons for the salary increment withholding differed from petitioner to petitioner, Marini responded that they did not and that the letters had to be the same.

When asked what he based his identification of those teachers being reviewed on, Marini responded that he based it on their usage of sick and personal days. No further reason was provided.

Overriding all of the Board's actions in this case was the fact that Union City was under State monitoring, pursuant to the Public School Education Act, N.J.S.A. 18A:7A-14. This monitoring, if not effective in addressing a District's problems, can lead to State takeover of the District (N.J.S.A. 18A:7A-15). It is clear that the District undertook these actions in order to demonstrate to the Department of Education that it had strict attendance policies. While compliance with the State monitoring process and satisfying of the State's expectations is a laudable goal, that cannot be accomplished at the expense of the statutory, contractual and due process rights of the District's staff members. Unfortunately, that is what occurred here, and the end does not justify the means.

The form letter sent to teachers in March 1987, which set up the first attendance conferences in this process, stated: "Our discussion will focus on your continued performance problems, specifically your attendance. Since this conference will impact on future decisions, please feel free to ask a representative of the Union City Education Association to attend with you." The letter does not say that there were performance problems in the classroom by the teacher or that there was any discontinuity of instruction. Rather, this letter defines the performance problem to be reviewed as attendance, per se.

Testimony established that at those spring 1987 conferences, teachers were given an opportunity to explain the reasons for their absences over their entire employment in respondent school district. Nothing was written summarizing the individual conferences or establishing goals for improvement, monitoring processes or remedial steps for the teachers. The next contact with the petitioners in this case was the May 26, 1988 form letter, stating: "Your attendance has become a critical issue." Later in the letter, it

stated: "Consistent instruction necessary for the students cannot be provided in this circumstance. This must be corrected." The only fact in the letter was a number reflecting the total absence days for 1987-88. I **CONCLUDE** that this letter supports petitioners' contention that the number of absences was the only basis for the salary increment withholdings, and that the circumstances of the absences were not considered.

The naked assertion that consistent instruction could not be provided under the circumstances, without any showing that the absences were excessive, or that the teachers' evaluations were negative, or that there was discontinuity of instruction, is not legitimate. In fact, Marini testified at the hearing that only perfect attendance during the 1987-88 school year would have prevented him from recommending that the increment be withheld for 1988-89. That is clear proof that this process was driven by the numbers and not by any consideration of the reasons for the absences or their impact on the continuity on instruction. Further, no contact was made with these teachers during the 1987-88 school year regarding their attendance. Thus, there was no monitoring or other effort to either inform the teachers that their absences were still excessive, or remedy any problems that might exist.

Finally, on July 7, 1988, after the conclusion of the 1987-88 school year, a third form letter was sent to petitioners setting up the final conference with Marini. This letter again included the following language: "Your attendance has become a critical issue. Consistent instruction necessary for the students cannot be provided in this circumstance. This MUST be corrected." There is no explanation from the Board of how the perceived problem could be corrected after the end of the school year and within one month of the Board's action. This form letter was mechanistic and further evidence that respondent acted in a mechanistic and formulaic manner.

Based on the testimony and evidence presented in this case, I **CONCLUDE** that the respondent's withholding of petitioners' salary increments was based on a subjective determination that their sheer number of absences was "excessive." Thus, it was arbitrary, capricious and unreasonable. Petitioners have made a prima facie case in that regard, thus meeting their burden of proof. Respondent has presented nothing

supporting its contention that the circumstances of the absences were considered, or that discontinuity of instruction resulted from the absences of any of the petitioners. Concededly, any absence by a regular classroom teacher interferes with the continuity of instruction. But that does not negate the teachers' statutory and contractual entitlement to use their allotment of sick days, for legitimate reasons, in a school year. Legitimate use of sick days per se, cannot result in punishment. Yet, that is what occurred in this case.

This conclusion is not a substitution of the ALJ's judgement for that of the Board. Nor is it an improper placing of a burden of proving that the absences disrupted instructional continuity on the respondent. Rather, it is a conclusion that the petitioners have made a prima facie case that their absences did not disrupt instructional continuity and that respondent's action, as to each petitioner, was arbitrary, capricious and unreasonable, and that respondent has not answered that prima facie case with credible evidence. See, Kopera v. West Orange Board of Education, 60 N.J. Super 288 (App. Div. 1960). See also, Trautwein v. Bound Brook BOE. As respondent's counsel correctly states in his brief: "The Trautwein case clearly stands for the proposition that excessive absenteeism, even if legitmate, may be good cause to withhold a teaching staff member's increment so long as the Borad's action is not arbitrary, unreasonable or induced by improper motives." Brief, at 9. In this case, the Board's action was arbitrary and unreasonable. Therefore, petitioners' absenteeism was not good cause for withholding their increments.

ORDER

It is **ORDERED** that respondent's action in withholding petitioners' salary increments for school year 1988-89 is hereby **REVERSED.**

It is **ORDERED** that respondent restore to petitioners the scheduled salary increments for school year 1988-89, as follows:

JONES	$1,877
KOHL	3,219
POTENTE	3,377
DIEHL	3,183
MARQUEZ	1,819
SUMMERS	5,696
BULL	3,885
DECARLO	4,049
DELLERT	3,548
McGUIRE-GILHOOLEY	2,063
SCIACCHETANO	3,006
CONNELLY	3,829

It is further ordered that petitioners be placed on the district's salary guide on the step they would hold if their 1988-89 increments had not been withheld.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **Saul Cooperman** for consideration.

February 26, 1990
DATE

OLIVER B. QUINN, ALJ

Receipt Acknowledged:

3/1/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 1 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

vcb/e

LUCILLE MC KEON BASS ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF UNION CITY, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The parties' exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

Petitioners agree with and support the findings and conclusions of the initial decision but except to the ALJ's dismissal of their allegations of the Board's failure to follow its own attendance policy and its interfering with their ability to use sick and personal leave. Petitioners also except to the ALJ's barring their testimony with respect to the Board's actions in removing them from their classes and using them as substitutes (TII 97/22-112/15). Of this they state:

> ***This testimony was sought for the purpose of supporting petitioners' claims that the Board's actions were arbitrary and capricious. Specifically the Board was attempting to discipline teachers for allegedly disrupting the continuity of instruction due to absences. Yet, at the same time, the petitioners were removed from classes in order to act as substitutes. Petitioners contend that the Board could not logically ascribe any impact on the educational process solely to teacher attendance given an equal or greater number of class days lost as the result of the Board's substitution practices.
> (Petitioner's Primary Exceptions, at p. 2)

In addition to the above, petitioners aver that the remedy accorded by the ALJ is incomplete because it fails to grant pre-judgment interest when the circumstances of the matter demonstrate that the Board's action was taken in bad faith, i.e., the withholdings lacked factual basis and reliance on sheer number of absences was contrary to existing legal interpretations by the Commissioner and State Board. Petitioners also except to the fact that the initial decision did not specify removal of all letters, memoranda or other documents, and any other references in their personnel or district files relating to the invalid increment withholdings.

The Board's first exception avers that the initial decision erroneously places Petitioner Eileen Jones among those ordered to receive their salary increments for the 1988-89 school year since she withdrew from the matter. (See initial decision at p. 2.) A review of the record confirms Ms. Jones' withdrawal, thus, the initial decision is hereby corrected to delete her from the relief granted on page 39 of the initial decision.

The Board alleges that the ALJ erred in basing his determination on allegations common to all petitioners, i.e., that the alleged reasons given for the salary increment withholdings constituted an unlawful interference with and limitation on statutory and contractual rights to use sick and personal leave, an argument that he had dismissed at the close of petitioners' testimony for failure to make out a prima facie case. More specifically, the Board excepts to that portion of the initial decision which reads:

> ***Concededly, any absence by a regular classroom teacher interferes with the continuity of instruction. But that does not negate the teachers' statutory and contractual entitlement to use their allotment of sick days, for legitimate reasons, in a school year. Legitimate use of sick days per se, cannot result in punishment.*** (Initial Decision, at p. 38)

As to this, the Board urges that such statement amounts to a rule that as long as the legitimate sick and personal days are utilized within the statutory and contractual rights of petitioners within a school year, a board of education cannot determine excessive absenteeism. (Board's Exceptions, at p. 3) It is thus the Board's conclusion that the initial decision is fatally flawed because of the ALJ's confusion of legal principles involved in this type of matter.

The Board also avers that the ALJ erred in focusing almost exclusively on petitioners' attendance over the last five years rather than placing the individual's attendance pattern within the context of his/her total employment history as the Board did in reaching its determination to withhold the salary increments. By way of example, the Board states:

> ***[Petitioner] Bull's case serves as a microcosm for the analysis of the ALJ as it applies to other Petitioners as well. Initially, the ALJ notes merely that Dr. Bull's use of sick days*** during the period September 1959, her date of hire, through June 1983, "is accurately listed in Exhibit J-474." See Initial Decision at p.9. No record of Dr. Bull's attendance was available for years 1959-60, 1960-61 and 1961-62. Assuming that Dr. Bull's attendance was perfect for those three years in which no records are available, a dubious assumption given her history from the 1962-63 school year onward, she was absent due to illness 314.5 days during those twenty-four

> years, or an average of 13.1 days per year. By merely noting an exhibit number, the ALJ minimizes the impact of Dr. Bull's attendance -- as he has similarly done for every other Petitioner in this matter -- on the continuity of instruction provided to students over many years. As a result of the ALJ's peculiar technique, he notes not the negative factors of 314.5 career days absent by the beginning of the 1983-84 school year for Dr. Bull, but the fact that "Dr. Bull began the 1983-84 school year with 31 accumulated sick days and 2 personal days." See Initial Decision at p. 10. The ALJ then illustrates how Dr. Bull utilized her sick and personal days for the 1983-84, 1984-85, 1985-86, 1986-87, and 1987-88 school years. Id. The ALJ does not point out that at the end of the 1987-88 school year, Dr. Bull had accrued only 18.5 sick days for a career that had spanned twenty-nine years, an average of .64 sick days accrued per year! The impression which the ALJ thus seeks to leave is that Petitioner Bull utilized a mere "12 of her 30.5 accumulated sick days and 1/2 personal day" for the 1987-88 school year. Id.
>
> Respondent respectfully submits that this technique fatally infects the ALJ's analysis and ultimate determination not only with respect to Petitioner Bull, but with respect to all of the Petitioners. As long as Petitioners, it would seem, merely take "what is coming to them", this ALJ has very little trouble in placing the burden, impermissibly we note, on the Respondent to prove discontinuity of instruction. The ALJ also has little trouble in deciding "who is right" in the determination over the exercise in discretion on the part of the Board.
>
> (Id., at pp. 4-5)

In addition to the above, the Board argues that contrary to the well-settled principles established in Kopera, supra, the ALJ substituted his judgment for that of the Board. It likewise avers that the ALJ gave little credence to the rulings in Trautwein, supra, and Angelucci, supra, that excessive absenteeism even if legitimate and within statutory and contractual entitlements may be a basis for withholding. It also points to the decision in Meli v. Bd. of Ed. of the Burlington County Vocational-Technical School, 1984 S.L.D. 906, aff'd State Board 921 wherein it was held that "[c]ommon sense dictates that a teacher's continued absence must, at some point, have negative impact upon her pupils even if a board of education is unable to prove the relationship between the teacher's attendance and pupil progress." (at 913)

The Board also provides a lengthy rebuttal to the ALJ's conclusion that the Board failed to support concern for continuity of instruction and vigorously sets forth the distinguishing factors

between the instant matter and cases relied on by the ALJ to reverse the withholding, e.g., Vonita Smith, supra; Montville, supra; Kuehn, supra.

Upon review of the record, the Commissioner adopts the recommended decision of the ALJ. While the record clearly establishes the Board's concern for reducing excessive absenteeism and as in Smith, supra, the Board, the superintendent and the assistant superintendent are to be commended for their efforts to improve staff attendance, the record also clearly establishes that the procedures used were mechanistic in that virtually no nexus existed between the attendance review being conducted by central office administrators and the evaluation of the employees' performance.

The ALJ's analysis bears repeating here:

> The form letter sent to teachers in March 1987, which set up the first attendance conferences in this process, stated: "Our discussion will focus on your continued performance problems, specifically your attendance. Since this conference will impact on future decisions, please feel free to ask a representative of the Union City Education Association to attend with you." The letter does not say that there were performance problems in the classroom by the teacher or that there was any discontinuity of instruction. Rather, this letter defines the performance problem to be reviewed as attendance, per se.
>
> Testimony established that at those spring 1987 conferences, teachers were given an opportunity to explain the reasons for their absences over their entire employment in respondent school district. Nothing was written summarizing the individual conferences or establishing goals for improvement, monitoring processes or remedial steps for the teachers. The next contact with the petitioners in this case was the May 26, 1988 form letter, stating: "Your attendance has become a critical issue." Later in the letter, it states: "Consistent instruction necessary for the students cannot be provided in this circumstance. This must be corrected." [emphasis in text] The only fact in the letter was a number reflecting the total absence days for 1987-88. I CONCLUDE that this letter supports petitioners' contention that the number of absences was the only basis for the salary increment withholdings, and that the circumstances of the absences were not considered.
>
> The naked assertion that consistent instruction could not be provided under the circumstances,

> without any showing that the absences were excessive, or that the teachers' evaluations were negative, or that there was discontinuity of instruction, is not legitimate. In fact, Marini testified at the hearing that only perfect attendance during the 1987-88 school year would have prevented him from recommending that the increment be withheld for 1988-89. That is clear proof that this process was driven by the numbers and not by any consideration of the reasons for the absences or their impact on the continuity of instruction. Further, no contact was made with these teachers during the 1987-88 school year regarding their attendance. Thus, there was no monitoring or other effort to either inform the teachers that their absences were still excessive, or remedy any problems that might exist.
>
> Finally, on July 7, 1988, after the conclusion of the 1987-88 school year, a third form letter was sent to petitioners setting up the final conference with Marini. This letter again included the following language: "Your attendance has become a critical issue. Consistent instruction necessary for the students cannot be provided in this circumstance. This MUST be corrected." There is no explanation from the Board of how the perceived problem could be corrected after the end of the school year and within one month of the Board's action. This form letter was mechanistic and further evidence that respondent acted in a mechanistic and formulaic manner. (emphasis supplied)
>
> (Initial Decision, at pp. 36-37)

A review of the evidence in this matter indicates that with few exceptions appraisals of employee performance did not identify excessive absenteeism as a performance problem. Evaluation upon evaluation rate attendance as above average and outstanding while precious few rate it as only satisfactory. While some references to attendance being a need area may be found in the performance appraisals and Professional Improvement Plans (PIPs) of some petitioners, they nonetheless fail to assist the Board in overcoming the allegation that sheer number provided the basis for the increment withholding actions as illustrated below.

During the 1985-86 school year Edward Dellert was evaluated as in need of improving attendance (P-147). However, during the 1986-87 and 1987-88 school years, his evaluations designate attendance as satisfactory with no reference whatsoever to attendance found in his PIPs (P-418-420). Tracy Summers was rated as in need of improving attendance during the 1984-85 school year (P-141-42) but from the 1985-86 school year to the time of her withholding her performance appraisals rated attendance as satisfactory to above average with no need for improvement

identified in her annual performance reports or PIPs (P-143-147). Johanna De Carlo's attendance was rated as unsatisfactory in 1985 (P-229) and in need of improvement at the end of the 1986-87 school year (P-231). However, for the school year within which increment withholding was recommended, her attendance was evaluated as above average (P-232) with no reference whatsoever made in her 1987-88 annual evaluation report and PIP to attendance (P-233).

Unfortunately, review of the record in this matter appears to indicate a classic example of the "left hand not knowing what the right hand is doing." While central office may have been concerned about attendance and discontinuity of instruction, the individuals conducting performance evaluations who would have direct knowledge and observation of negative impact on instruction overwhelmingly were not. In such circumstances, increment withholding cannot be sustained by the Commissioner.

Where attendance has been identified as a problem area, evaluations and PIPs must reflect that a problem in need of remediation exists. In the instant matter, while the form letters sent and the conferences held with central officer staff reflect a concern for discontinuity of instruction as a result of poor attendance, the performance appraisals and PIPs of petitioners for the most part did not.

Further, the Board is incorrect in arguing that the ALJ did not understand the appropriate standard of review in this matter. His legal analysis is both appropriate and well-reasoned. He clearly understood that he may not substitute his judgment for the Board's and that even where absences are within statutory and contractual entitlements and where teachers are excellent, increment withholding may occur. However, he likewise recognized that where evaluation upon evaluation upon evaluation fails to identify attendance as a problem area, discontinuity of instruction cannot be cited as the basis for withholding.

As to the petitioners' position that pre-judgment interest should be ordered in this matter, the Commissioner finds and determines that the criteria for the award of such interest is not present in the record, i.e., there is no evidence of bad faith motivation for the withholdings nor that the sanction was applied in deliberate violation of statute or rule (N.J.A.C. 6:24-1.18(c)1). Given petitioners' attendance records, it cannot be said that a concern by the Board or its central office administrators for continuity of instruction was not legitimate. What is lacking in the matter is communication between the evaluators and those administrators of that legitimate concern.

Moreover, review of the evaluations and what is purported to be the PIPs of petitioners raises serious concern that the requirements of N.J.A.C. 6:3-1.21 are not being met by evaluators in the district. A substantial number of the evaluations appear cursory and lack PIPs consistent with the requirements of N.J.A.C. 6:3-1.21(h). The Board is reminded that all tenured employees must have specific professional improvement plans. It is not sufficient to indicate that no need for improvement has been identified.

As to petitioners' request for an order to expunge their personnel and other files, the Commissioner agrees that the letters and memoranda referencing increment withholding, disciplinary action or poor performance based on discontinuity of instruction should be removed. The record of attendance is not dependent upon retention of such documents and may independently serve in the future to establish patterns of attendance.

Finally, the Commissioner stresses that the outcome of the instant matter in no way precludes the Board from taking action in the future to withhold the increment of any petitioner if it believes his or her chronic absenteeism is excessive and contributing to discontinuity of instruction and that concern is clearly and timely communicated to that individual by all concerned.

Accordingly, the initial decision is adopted by the Commissioner for the reasons stated therein except for the correction made as to Petitioner Jones. Petitioners' increments are to be restored and placement on the salary guide shall be as though no such withholding ever took place. Monies owing and due them shall be paid forthwith. The settlement with respect to Petitioner Kerick-Rothman is likewise adopted.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4591-89
AGENCY DKT. NO. 120-5/88

WEST NEW YORK BOARD OF EDUCATION,
Petitioner,
v.
LYDIA GILMARTIN,
Respondent.

Joseph J. Ferrara, Esq., for petitioner (Krieger, Ferrara, Flynn, Catalina, attorneys)
Sheldon H. Pincus, Esq., for respondent (Bucceri & Pincus, attorneys)

Record Closed: January 31, 1990 Decided: March 2, 1990

BEFORE **WARD R. YOUNG**, ALJ:

STATEMENT OF THE CASE

The West New York Board of Education (Board) claims that by mistake, inadvertent and otherwise, it established the 1985-86 salary of Lydia Gilmartin, respondent, a school psychologist then in its employ, at a rate higher than to which she was otherwise entitled. The Board seeks judgment against repondent for the amount of the asserted overpayment, $2,475, together with interest, costs, and attorneys fees.

PROCEDURAL HISTORY

On or about March 5, 1987 the Board filed a complaint against respondent seeking judgment in the Superior Court of New Jersey, Special Civil Part, Hudson County, docket number 530410. Ten months later the Board was granted an Order by which it was allowed to substitute service of the complaint upon respondent by mailing the summons

following the complaint and the complaint itself to the respondent at her last known address. After service was made upon respondent under the terms of the Order, she filed an answer in Superior Court on February 16, 1988. On March 3, 1988 respondent moved to dismiss the complaint for improper service upon her or, alternatively, she sought dismissal for lack of subject-matter jurisdiction.

On April 27, 1988 the Honorable Elaine L. Davis, J.S.C., issued an Order by which respondent's motion to dismiss for lack of proper service was denied and by which the entire matter was transferred to the Commissioner of Education for determination under N.J.S.A. 18A:16-9. More than one year later, the Commissioner transferred the matter on June 22, 1989 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A telephone prehearing conference was conducted by this judge on August 24, 1989 immediately after which the Prehearing Order issued. During that conference counsel to the parties agreed to submit the matter on the record for disposition of cross-motions for summary decision with supporting letter memorandum. The record consist of the initial pleadings filed in New Jersey Superior Court, inlcuding the complaint and answer, motion papers and respondent's certification in lieu of affidavit, the Court Order by which the matter was transferred to the Commissioner, and letter memorandum filed here by the parties in support of their position on the cross-motions based on a filed joint stipulation of fact. The record on the motion closed January 31, 1990 upon the filing of the Board's letter memoranda in support of its position.

Findings are reached in this initial decision that the Board filed its initial complaint more than 90 days after the date the cause of action arose and that no basis exists upon which the administrative rule of limitations at N.J.A.C. 6:24-1.2 should be relaxed. The conclusion is reached that the complaint against repondent must be dismissed as having been filed out of time under the cited regulation.

ISSUES

Pursuant to the prehearing order entered the issues submitted for adjudication are these:

1. Was respondent over paid for her services during the 1985-86

school year, and if so, is respondent required to return the overpayment to the Board?

2. Was the alleged overpayment a 'mistake of law' or a 'mistake of fact'?

3. Shall the Petition of Appeal be dismissed because of laches or the alleged failure of the Board to comply with the filing requirements of N.J.A.C. 6:24-1.2?

The last stated issue is, of course, the threshold issue which must be decided prior to a consideration of the first two substantive issues. The stipulation of fact executed and filed here by the parties for a disposition of all stated issues shall now be presented.

STIPULATION OF FACT

The facts stipulated by the parties are set forth in full here:

1. Respondent, Lydia Gilmartin (hereinafter referred to as the "respondent" or "Gilmartin"), was employed by the petitioner, West New York Board of Education (hereinafter referred to as the "petitioner" or the "Board"), as a part-time Bilingual Psychologist for the period of time from December 1, 1984 through December 30, 1984. This appointment was made by the respondent on November 14, 1984. (Exhibit J-1) Gilmartin provided all services required of her under this appointment.

2. On December 12, 1984, the Board adopted a resolution appointing Gilmartin as a Bilingual Psychologist for the period of time from January 1, 1985 through June 30, 1985. (Exhibit J-2) Gilmartin performed all services required of her under this appointment.

3. On or about August 29, 1985, the Board appointed Gilmartin as a School Psychologist for the 1985-86 school year. This resolution incorrectly set her salary at $20,156 and was later corrected to provide an annual salary of $20,325.

4. On December 11, 1985, the Board adopted a resolution adjusting the annual salary of Gilmartin from $20,156 to $22,800, retroactive to September 1, 1985. (Exhibit J-3) This salary figure was established by adding a base salary of $18,500 to the contractual psychologist differential of $4,300. Gilmartin provided all the services required of her pursuant to her appointment for the 1985-86 school year.

5. Gilmartin's employment with the Board terminated on June 30, 1986. The Board did not renew her employment for the 1986-87 school year.

6. In or about August, 1986, the Board's auditor alleged for the first time that Gilmartin had been overpaid for the 1985-86 school year.

7. In an undated resolution, the Board directed that Gilmartin should be notified of the alleged overpayment. (Exhibit J-4)

8. By letter dated October 24, 1986, the Board, through its attorney, notified Gilmartin of the alleged overpayment and demanded the return of $2,475. (Exhibit J-5)

9. By letter dated February 10, 1987, the Board, through its attorney, again demanded the return of the sum of $2,475 as an alleged overpayment to Gilmartin. (Exhibit J-6)

10. The Board filed a complaint in the Superior Court of New Jersey, Special Civil Part, Hudson County on or about March 5, 1987.

11. On or about January 11, 1988, the Board obtained an order permitting substituted service on Gilmartin by mailing the summons and complaint to her at her last known address.

12. Gilmartin's answer was filed on February 16, 1988.

13. By an order issued on April 27, 1988, this matter was transferred to the Commissioner of Education for determination pursuant to N.J.S.A. 18A:6-9.

ARGUMENTS OF THE PARTIES

I

Respondent contends that under N.J.A.C. 6:24-1.2(b) the matter must be dismissed on the facts stipulated. Respondent notes that her controverted salary was established by the Board on December 11, 1985 and by at least between August and October 1986, the Board had knowledge to at least believe that that established salary arguably exceeded the salary to which she was otherwise entitled. Respondent acknowledges the Board notified her of the asserted overpayment on October 24, 1986 and that it demanded the return of $2,475. But, respondent argues that the 90 days under N.J.A.C. 6:24-1.2(b) within which the Board was obligated to institute an action against her before the Commissioner began to run no later than the date, October 24, 1986, it notified her of its claim. Moreover, respondent asserts that under New Jersey law a cause

of action to recover money overpaid accrues when the payment was made.

Respondent maintains that the mere fact the Board elected to take no formal action on its claim until March 5, 1987 by filing its complaint in Superior Court, the wrong forum at that, does not absolve it of its obligation to have filed Petition of Appeal before the Commissioner of Education within 90 days of October 24, 1986.

Respondent asserts that under a line of cases including Bd. of Education Bernards Tp. v. Bernards Tp. Ed. Ass'n., 79 N.J. 311 (1979) and others which are in accord with Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Supra 109 (App. Div. 1980) a party who wishes to invoke the jurisdiction of the Commissioner under N.J.S.A. 18A:6-9 to hear and determine a controversy or dispute arising under school law must file a Petition of Appeal within 90 days from the date the cause of action arose. The complaining party is not absolved from the 90 day requirement by filing an action in another forum under that forum's statute of limitations. Respondent contends that because Judge Davis granted her motion regarding subject matter jurisdiction and transferred the entire case to the Commissioner does not absolve the Board from, in the first instance, having complied with the administrative rule limitations.

Finally, respondent maintains that on the merits she was not overpaid by the Board in 1985-86 and, moreover, regardless of the merits of the Board's claim it is not entitled to recover any monies from her.

Respondent demands a dismissal of the complaint against her.

II

The Board claims that the administrative rule of limitations is not applicable in this matter because its complaint originally filed in Superior Court was based on respondent's asserted unjust enrichment of receiving more money than that to which she was entilted. The Board contends that such a claim filed in Superior Court is subject to a two year statute of limitation. The Board points out that respondent had argued before Judge Davis that the Commissioner had jurisdiction over its unjust enrichment claim against her and it was on that basis Judge Davis transferred the matter to the Commissioner. In the Board's view, respondent should not now be heard to complain that the issue was not timely filed before the Commissioner under N.J.A.C. 6:24-1.2(b) because the issue of unjust enrichment is now before the Commissioner based soley upon

respondent's motion. According to the Board, respondent must be seen to have waived any timeliness claim against it.

The Board argues that even if the 90 day administrative rule applies it must be relaxed in the circumstances because of the public interest issue involved. It is presumed here that the Board refers to an asserted overpayment of public funds for services already rendered.

Finally, the Board contends that the evidence already in this record shows the claimed overpayment resulted from an "internal procedural error" with respect to the application of N.J.S.A. 18A:29-5. The Board demands judgment in its favor.

ANALYSIS

N.J.A.C. 6:24-1.2(b) provides as follows:

> (b) The petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested case hearing.

In this case, of course, the 'petitioner' is the Board and it had notice of the action of which it now complains on the date the action was taken which was December 11, 1985. But, even if it can be said that the Board did not have 'notice' of the action of which it now complains until October 24, 1986 and, even if it can be seen that the Petition now before the Commissioner was filed March 5, 1987 in New Jersey Superior Court, the petition was filed beyond 90 days from October 24, 1986.

In Bernards Tp. Bd. of Ed. v. Bernards Tp. Ed. Ass'n, Supra, the Court cautioned that while advisory arbitration was an appropriate intermediate procedural step for handling a dispute over the withholding of a teacher's salary increment, the teacher who does proceed to arbitration is not relieved from compliance with 90-day requirement of N.J.A.C. 6:24-1.2 for filing a petition of appeal with the commissioner. 79 N.J. at 326-327, n. 4. In Riely v. Hunterdon Central High Bd. of Ed., Supra a nontenure whose contract was not renewed by the Board proceeded to binding arbitration on her asserted grievance concerning her non-reemployment. Following an adverse decision, she filed a petition to the Commissioner which the Board challenged as having been filed out of time under the administrative rule limitation. The Court in a per curiam decision held that Riely was

under an obligation to comply with the 90 day requirement regardless that she proceeded to binding arbitration. Therefore, the Board's motion to dismiss Riely's case as having been filed untimely was granted.

Moreover, In North Plainfield Educ. Ass'n v. Bd. of Educ., 96 N.J. 587 (1984) the application of the 90-day requirement under N.J.A.C. 6:24-1.2 was applied to two teachers who sought credit on a salary scale for time spent on a sabbatical. The Court held that where the right sought to be vindicated before the Commissioner is not statutory and, that as a result, the administrative rule of limitations applies.

These cases demonstrate forcefully that the 90-day rule of limitation applies to all causes of action filed to the Commissioner not otherwise predicated on a statutory right. In this case, there is no 'statutory right' sought to be vindicated by the Board. It seeks to recover monies allegedly overpaid to petitioner in 1985-86 which claim is subject to the administrative rule limitation.

It is noted that the Board presents no facts or circumstances upon which the administrative rule limitation should be relaxed. The argument that the recovery of money assertedly overpaid respondent invokes the public interest is not persuasive. There is no suggestion that respondent engaged in any conduct which misrepresented her credentials, her experience, or prior salary at the time the Board established the controverted salary in December 1985. The public interest would be better served by the Board insuring that all salaries it establishes for its employees are properly established based on its salary policies. The public interest would not be served by continuing this litigation after the lapse of more than four years from the date the Board established the controverted salary.

Finally, the fact that Judge Davis deferred to the jurisdiction of the Commissioner of Education by transferring the Board's claim against respondent does not absolve the Board from having complied with the 90-day limitiation.

CONCLUSION

Having found that whatever cause of action the Board may have had against repondent had accrued on December 11, 1985, or at the very latest October 24, 1986, and having also found that the Board did not institute an action against respondent until

March 5, 1987, I conclude that the present cause of action is untimely under N.J.A.C. 6:24.1.2(b). Therefore, the Petition of Appeal is hereby dismissed.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

3-2-90
DATE

Ward R. Young
WARD R. YOUNG, ALJ fcc

Receipt Acknowledged:

3/8/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 9 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

tmp

BOARD OF EDUCATION OF THE TOWN OF WEST NEW YORK,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
LYDIA GILMARTIN,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. Petitioner's exceptions and respondent's reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

In its exceptions, petitioner (hereinafter "the Board") asserts that the Superior Court was a proper venue for disposition of this claim, which was filed as an unjust enrichment action within the two-year statute of limitations applicable in that forum. Further, the Board did not initially file with the Commissioner because respondent was no longer a school district employee and hence was outside the Commissioner's jurisdictional reach. This absence of an employer-employee relationship, the Board argues, precluded pursuing the present dispute in the administrative forum until respondent moved to voluntarily submit herself to the Commissioner's jurisdiction. Moreover, absence of an employer-employee relationship distinguishes the present dispute from cases relied upon by the ALJ in all aspects of his initial decision. Since the Commissioner became empowered to determine this matter only upon respondent's motion to transfer from Superior Court, it would be both inequitable and improper to reckon the 90-day limitation of N.J.A.C. 6:24-1.2 from any time prior to such transfer. Alternatively, if the 90-day rule is found to apply to the original cause of action, either the public interest must demand that the rule be relaxed or respondent must be deemed to have waived timeliness as a defense by virtue of her motion for jurisdictional transfer.

In reply, respondent generally characterizes the Board's exceptions as restatements of arguments considered and rejected by the ALJ (Initial Decision, at pp. 5-7), endorses the ALJ's analysis of those arguments and offers additional citations in support of the ALJ's refusal to relax the 90-day rule. She further observes that, if the Commissioner's jurisdiction did not extend to persons no longer employed by a school district, the Commissioner would have no

authority to hear the many termination cases filed after an employer-employee relationship has been severed. *

Upon review of this matter, the Commissioner concurs with the ALJ that the Petition of Appeal should be dismissed. In arguing against application of the 90-day rule, the Board primarily relies on having chosen an alternate but correct forum to pursue its complaint and notes that transfer of this matter to the Commissioner was on respondent's initiative. The court order effecting the transfer provides no hint of the reasons for the judge's decision; the arguments of the parties that led to the order, however, are pertinent and revealing. In essence, respondent argued that jurisdiction in this matter properly belonged with the Commissioner, since the underlying controversy whether or not there was an overpayment and, if so, how or if it was to be recovered hinged solely on interpretation of an education statute (N.J.S.A. 18A:29-5) and prior school law cases--precisely the area of the Commissioner's expertise and responsibility under N.J.S.A. 18A:6-9. The Board, on the other hand, argued that Superior Court was the correct venue:

> This case belongs in the Courts according to S. Orange-Maplewood Ed. Assn. v. Bd. Ed. S. Orange, 146 N.J. Super. 457, 462 (App. Div. 1977) because it involves terms and conditions of employment, overpayment, unjust enrichment and conversion. It does not involve educational policy. To the extent that it involves the school laws, it concerns the interplay between a collective bargaining agreement and the interpretation of a legislative enactment, neither of which is within the expertise of the Commissioner of Education. Furthermore, the Commissioner of Education cannot compel a person no longer employed by a Board of Education to pay (or repay) anything to a Board of Education; only the courts can do this. This court should treat

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* Gilmartin also objects to a statement in the Board's exceptions to the effect that timeliness was only raised as an issue after the prehearing conference, in connection with an application for summary decision. The Commissioner concurs that the 90-day rule is plainly listed on the prehearing order as an issue raised during the telephone prehearing conference of August 24, 1989.

Gilmartin further alleges that the Board's exceptions were out of time unless hand-delivered to the Commissioner on March 22, since she received her copy on March 23 with a cover letter dated March 22, the last day for timely filing assuming the Board received the initial decision, as she did, on March 12 (two mailing days after posting by OAL). The Commissioner notes that the Board's exceptions were filed with his office on March 22, 1990; thus, their timeliness is not at issue herein.

> this dispute like any other dispute about overpayment of wages and unjust enrichment and provide a decision on the merits after trial.
>
> (Letter Memorandum of April 4, 1988, at p. 5)

Clearly, these arguments directly reach the issue of the correct forum for this matter and raise virtually every point now brought forward by the Board in its own defense. After hearing these arguments, however, Judge Davis transferred this matter to the Commissioner without comment and without retaining jurisdiction. In the Commissioner's view, this constitutes a clear determination on the part of the Court that the administrative forum was more than an acceptable alternative; it was in fact the forum of primary jurisdiction, where the Board should have initially filed its complaint. Moreover, the Commissioner would agree with this determination, in that application of the statute in question is directly within his expertise, the aspect of respondent's salary under dispute is unrelated to terms and conditions of employment or other collective bargaining issues, and respondent's obligation to abide by the Commissioner's decision would be enforceable in Court if the Board prevailed on the merits.

Therefore, the Commissioner rejects the Board's contention that he should view the initial filing in Superior Court as a proper alternative to filing with the Commissioner, and that, because the matter was transferred on respondent's initiative, he should defer to the statute of limitations governing unjust enrichment complaints in the forum chosen by the Board or deem respondent to have waived timeliness as a defense. Nor does he find in the circumstances of this case any compelling justification for delay in tolling, or for relaxation of, the 90-day rule. To the contrary, the Commissioner notes his agreement with the ALJ that the public interest in this matter would best be served by an end to litigation and more careful attention to proper establishment of salaries in the future.

Accordingly, for the reasons stated in the initial decision, together with those added herein, the recommendation of the Office of Administrative Law dismissing the instant Petition of Appeal is adopted as the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 4437-89
AGENCY DKT. NO. 183-6/89

M.L.A. ON BEHALF OF HER
MINOR CHILD E.A.S.,
Petitioner,
v.
BOARD OF EDUCATION OF
THE CITY OF SOUTH AMBOY,
MIDDLESEX COUNTY,
Respondent.

M.L.A., petitioner, *pro se*

Clark W. Convery, Esq., for respondent (Convery, Convery & Shihar)

Record Closed: October 27, 1989 Decided: March 22, 1990

BEFORE RICHARD J. MURPHY, ALJ:

Statement of the Case and Procedural History

Petitioner, M.L.A., claims that respondent Board of Education's (Board) three-day suspension of her daughter, E.A.S., for tardiness was unduly harsh and she seeks expungement of the record of suspension and other relief. For the reasons set forth below, the petition is dismissed and judgment entered for the respondent Board. (E.A.S. served the period of suspension before the petition for emergency relief could be considered.)

M.L.A. filed her petition with the Commissioner of Education (Commissioner) on June 2, 1989, including a request for a stay, and the Commissioner transmitted

the matter to the Office of Administrative Law (OAL) on June 19, 1989 for hearing as a contested case under *N.J.S.A.* 52:14F-1 *et seq.* The case was preheard on August 10, 1989, and heard on October 27, 1989 in Sayreville, when the record closed. The due date for submission of this initial decision was extended until March 22, 1990, due to a heavy backlog of pending decisions. I regret any inconvenience that this delay may have caused the parties.

Issues

The issues, as set forth in the prehearing order are:

(1) Whether the action of the respondent Board of Education in suspending E.A.S. was lawful and warranted and, if not, whether the student's record should be expunged.

(2) Whether the petitioner is entitled to other relief in the form of replacement tutoring and a repeat of a final Spanish Exam in light of her failure of the initial exam, after being absent on suspension during the class review period.

Findings of Fact

The facts are not in dispute and the parties stipulated to R-1 through R-7, including Board's policy on absenteeism, as well as warnings to E.A.S. that her tardiness was exposing her to possible suspension. The tardiness policy adopted by the Board of Education of South Amboy establishes standards and procedures for handling tardiness.

. . .

D. Consequences of Tardiness

1. Recognizing that on rare occasions, tardiness is unavoidable, students will be allowed two (2) lates per school year.

2. Upon the third late, the student will be assigned to a working detention for 1 full class session (45 min.). This detention must be served the day immediately following the tardiness.
(b) The student and parent will be notified that upon the next late (4th) the student will not be admitted to school unless accompanied by a parent who will sign the student in.

> 3. Upon the fourth late the parent must accompany the student to school and sign the student in. The student will be assigned another detention to be served the day immediately following the lateness.
>
> 4 Upon the fifth late the parents will be required to come to school for a conference with the principal or his designee. . The student will be assigned to detention to be served the day immediately following the lateness.
>
> 5 Upon the sixth late the student will be suspended for three days in accordance with the suspension policy.
>
> 6 Upon the seventh late the student and parent will attend a conference with the Superintendent or his designee to discuss solutions to the problem or an alternate educational program that may be suited to the student. [R-1; emphasis added]

E.A.S. was suspended under that policy for being tardy six times and she claims that the Board's action was unlawful, and not even in compliance with its own procedure. The Board defends the policy as reasonable and valid, while admitting that it has subsequently been revised to eliminate the three-day suspension after six times tardy and to substitute a Saturday detention, which, if missed by the student, will result in suspension (R-8 at p. 3 at para. 5).

The parties also stipulate as to E.A.S.'s grades with Spanish II (which she eventually failed) and those grades were as follows: first quarter 68; second quarter 68; mid-year 61; third quarter 65; fourth quarter 73; final exam 67; average 66. Under school policies, any grade under 70 receives no credit (R-2). Petitioner claims that her daughter failed Spanish because the three-day suspension for tardiness prevented her from attending tutoring which would have enabled her to pass the course. There is no dispute that E.A.S. was late on six occasions during the 1988-89 school year as reflected in R-3. The petitioner was advised of her daughter's tardiness and the possible increasingly severe consequences on November 1, November 29, and December 22, 1988 and February 8, 1989, the last of which letters stated that:

> In accordance with our Tardiness Policy I find it necessary to assign another day of administrative detention to [E.].
>
> The 45 minute working detention has be [sic] assigned for her 5th late. As stated in our previous letter a parent conference is

required with the principal. Please contact our office to arrange for this conference.

Once again, I ask that you discuss the seriousness of this matter with you child. Upon the 6th late the student will be suspended out of school for three days. Please note that these suspensions may affect grades and eligibility for sports and extra-curricular activities. These suspensions include no participation in school-related activities (e.g. sports, work study, field trips, etc.).

Your cooperation and understanding of the purpose of our policy is appreciated. [R-9; emphasis added]

The petitioner admitted in her testimony that her daughter's grades were "not the best," but argued that the Board had failed to follow its policy and did not notify her after the fourth late. She claimed that no meetings were arranged with the principal and the only call from the school was prior to the Board's later letter of suspension which was issued on April 3, 1989 and provided that:

Dear Mrs. Arnold:

I am sorry to inform you that it is necessary to suspend [E] for repeated violation of the Tardiness Policy. This is tardiness number six and [E] will be suspended on Tuesday, Wednesday, and Thursday - April 4, 5, and 6, 1989. She will have one day after she returns to school to get the assignments she missed from her teachers. She will then have three days to complete these assignments. [E.] will receive credit for the works she completes.

As previously stated the sixth tardy would result in a three day suspension and will require a parent conference for reinstatement. Please note that these three days may directly affect subject grades and eligibility for sports.

The consequences of any subsequent tardies will result with a parent-student conference to discuss solutions to the problem or an alternate educational program that may be suited to the student.

I appreciate your anticipated cooperation and understanding of our policy. Any further information regarding this incident can be obtained by contacting the high school office. [R-4; emphasis added]

The petitioner admits that she received letters from Principal William Beattie each time her daughter was late (R-3) and concedes that she took no action until March 20, 1989 when she made contact with Principal Beattie to object to the harshness of the three-day suspension. Petitioner was unable to convince the

principal to reduce the suspension and requested further relief from the Superintendent of Schools, Mr. John Olexa, on April 11, 1989. The Superintendent was also unwilling to reduce the suspension, and petitioner sought relief from the Board of Education by way of reconsideration of the three-day suspension policy. That policy was eventually reconsidered and revised in September of 1989, but not before E.A.S. was subjected to suspension. In addition to objecting to the harshness of the original suspension policy for six tardies, petitioner claims that the principal failed to meet with her after the fifth tardy as required by the original policy:

> [u]pon the fifth late the parents will be required to come to school for a conference with the principal or his designee. The student will be assigned to detention to be served the day immediately following the lateness. [R-1 at p. 3, para. 4]

Petitioner admits that she did not look at the policy after the initial letters of tardiness were received, but was generally aware of its terms, and was particularly aware that after the fifth tardy the parent would have to come into the school for a conference. M.L.A. also reprimanded her daughter for lateness, but apparently this did not have much effect, even though they resided approximately two and one-half blocks from the school. Petitioner concedes that she did not call the school after receiving the principal's letter of February 8, 1989 (R-9) which assigned a detention period for the fifth late and stated that a three-day suspension would follow the sixth late. There is no dispute that no one from the H.G. Hoffman High School, including the principal, called the petitioner after the fifth late to set up an interview.

After the sixth tardy, the principal wrote to petitioner on June 1, 1989, advising her that he would be suspending E.A.S. on June 6, 7, and 8, 1989 and also stated that: "[a]s previously stated the sixth tardy would result in a three day suspension. Please note that these three days may directly affect subject grades and eligibility for sports. The full suspension policy is in effect which includes no participation in any school related activities" (R-6). Petitioner also concedes that she received deficiency notices as to her daughter's declining performance in Spanish II, and had discussed the problem with E.A.S. and the teacher. As a result of the suspension in June, petitioner claims that E.A.S. was deprived of a valuable review period which might have permitted her to improve her performance and pass the course. Petitioner claimed that the Spanish teacher, Joann Blackmore, stated that E.A.S. might have done better on the final exam if not for the three-day suspension.

Ms. Blackmore testified that no review was held on June 6, the first day of the suspension. On June 7, she gave a quiz on the final chapter and an outline of the final exam on the blackboard, which the students were told to copy and use as an outline. Further review was held on June 8, when E.A.S. was absent, and on June 9, when E.A.S. had returned to school. Review on June 9 was for the whole period and the students were asked if they had any problems or questions. E.A.S. did not ask any questions and did not request any assistance from the Spanish teacher, despite her absence during two days of review. Ms. Blackmore also felt that E.A.S. had generally demonstrated a negative attitude toward the Spanish class initially, and, though there was some improvement in the fourth quarter, did not seek any remedial assistance. The key period of review that was missed was on June 7, when there was a quiz and a blackboard outline of the final. E.A.S. was aware that Ms. Blackmore had provided an outline on the blackboard, but she did not make any efforts to obtain that outline and did not ask to be able to take the quiz that she had missed.

Superintendent Olexa testified and stated that he became aware in April of 1989 that the suspension of E.A.S. was pending, and told petitioner that he was required to enforce the policy, but advised her of her right to appeal. He denies having told the petitioner that the policy was improper or unduly harsh, but claims to have merely indicated that the setting of such policies was a matter for the discretion of the Board of Education. As stated, that policy was eventually changed by the Board in September of 1987, when the three-day suspension for six times tardy was replaced by the more lenient policy of a Saturday detention.

There is no dispute as to the facts, which the parties have stipulated to.

Discussion and Conclusions

The issues of the lawfulness of the Board's actions in suspending E.A.S. as well as whether she is entitled to expungement of her suspension and other relief in the form of replacement tutoring and repeat of a final Spanish exam will be discussed together, since they are related questions.

The initial policy, proposing a three-day suspension for six times late, which has since been made more lenient, was, at the time, reasonable and appropriate and not so arbitrary and capricious or punitive as to warrant reversal by the Commissioner of Education. The Board also denies failing to follow the initial policy, and claims that

any dereliction of duty to arrange conferences was committed by the petitioner. Petitioner argues that the policy was unduly and unlawfully harsh, and not properly followed, in any event.

Policies concerning tardiness, and the possible ramifications, are one of the many matters left to the sound discretion of the Board of Education, and not to be disturbed by the Commissioner unless there is shown to be an abuse of that discretion. Although the three-day suspension after six periods of tardiness is a substantial sanction, I cannot and do not conclude that it was so unreasonable, arbitrary and capricious as to warrant reversal by the Commissioner. Tardiness and attendance are significant problems in public schools, and both deny the tardy students full benefit of education and generally disrupt the schools' operations. On that basis, the initial policy of the Board of Education of the City of South Amboy imposing a three day suspension after the sixth time late should not be reversed by the Commissioner, and I so recommend. I also note that the policy, in any event, has been modified by the Board in its discretion and that this issue is effectively moot. I address it here only because it has some relevance to the question of whether the petitioner and her daughter are entitled to other relief, such as expungement and replacement tutoring or repeat of the final Spanish exam.

Because of my conclusion that the action of the Board in establishing the three-day suspension policy was a lawful act within its discretion, and in light of my further conclusion that the Board did not fail to follow that policy in that it made appropriate contact with the petitioner, I finally **CONCLUDE** that petitioner and E.A.S. are not entitled to any relief by way of expungement or replacement tutoring or a repeat of the final Spanish exam.

In the event that the Commissioner rejects my conclusion as to the legality of the Board's initial policy, I **CONCLUDE**, in the alternative, that the petitioner has failed to show that the three-day suspension was the proximate cause of her daughter's failure of Spanish II, and that she is therefore not entitled to any of the relief sought and the petition should be dismissed.

Disposition

On the basis of the above findings of fact and conclusions of law it is **ORDERED** that the petition be **DISMISSED** and judgement be entered for the respondent Board of Education.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

March 22, 1990
DATE

RICHARD J. MURPHY, ALJ

Receipt Acknowledged:

3/23/90
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 23 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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M.L.A., on behalf of her minor child, E.A.S.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF SOUTH AMBOY, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the Board's attendance policy at the time of its imposition in this matter was not arbitrary or unreasonable. The fact that the Board, in its discretionary authority, later modified the policy has no bearing upon the validity of the policy at the time it was invoked. The Board's modification of said policy after the filing of the instant petition has rendered that aspect of this matter moot, it is noted. Moreover, the Commissioner finds that the Board acted in accord with its attendance policy in its contacts with E.A.S. and her parent, M.L.A., thus, entitling them to no relief by way of expungement or replacement tutoring or a readministration of the final Spanish exam.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5062-89
AGENCY DKT. NO. 194-6/89

GWEN LIPPINCOTT,
Petitioner,
v.
RIVERTON BORO BOARD
OF EDUCATION,
Respondent.

Richard A. Friedman, Esq., for petitioner (Zazzali, Zazzali, Fagella & Nowak, attorneys)

Marc I. Harrison, Esq., for respondent (Parker, McCay & Criscuolo, attorneys)

Record Closed: February 1, 1990 Decided: March 13, 1990

BEFORE **ROBERT W. SCOTT**, ALJ:

CASE STATEMENT AND HISTORY

On June 19, 1989, the petitioner, Gwen Lippincott, secretary to the administrative principal of the respondent filed a Petition of Appeal with the Commissioner of Education alleging that she had been forced to resign from her position with the respondent and that her resignation had been withdrawn prior to it being accepted by the respondent. On July 7, 1989, the respondent filed an Answer to the petitioner's petition and on July 13, 1989, the matter was transmitted to the Office of Administrative Law (OAL) for determination as a contested case. The petitioner submitted a Motion for Summary Decision and after considering the briefs by both parties, the undersigned granted the petitioner's motion.

FACTS

On April 24, 1989, the petitioner submitted a resignation to Administrative Principal

Ward. This resignation was dated April 21, 1989, and stated:

> Please accept my resignation from Riverton School, effective May 24, 1989. After eighteen successful years spent at Riverton, nine years as secretary to the Administrative Principal, I am looking forward to spending more time at home with my husband, who recently retired.

The petitioner told Administrative Principal Ward that she wished to leave her position immediately. Ms. Ward discussed the matter with respondent President Jones. Mr. Jones indicated that he and the other members of the respondent would approve the petitioner immediately leaving her position and receiving severance and vacation pay.

Ms. Ward advised petitioner of Mr. Jones' decision and told the petitioner that she would receive her severance and vacation pay. The petitioner was given a check for four weeks' severance and vacation pay and she removed her belongings from her desk and left the school. The petitioner deposited the check for her severance and vacation pay in her bank account on May 1, 1989. The actual last day of work for the petitioner was April 21, 1989.

On May 1, 1989, the respondent met during an executive session and the petitioner's resignation was discussed. This discussion was reflected in the respondent's minutes of that meeting.

On May 4, 1989, the petitioner wrote the respondent rescinding her resignation, offering to return to work immediately and offering to return the severance and vacation pay. The respondent did not and has not allowed the petitioner to return to her position resulting in the present action. It is undisputed that the petitioner was a tenured employee with the respondent, pursuant to N.J.S.A. 18A:17-2.

DISCUSSION

The petitioner through the above statute as a tenured secretary acquires the same protection afforded tenured teachers in this State. These protections provided to tenured employees of our local school system have been liberally construed in favor of the employee. (Citation omitted).

However, even in light of these protections, the facts as stated above would indicate that the petitioner never resigned from her position as secretary to the administrative principal. On April 21, 1989, the petitioner decided that she wanted to leave her position as secretary and she prepared the resignation which has been quoted above. The resignation, however, was not to take effective until May 24, 1989. On April 24, 1989, the petitioner went to the school and gave the resignation to her supervisor, Administrative Principal Ward. The petitioner indicated that she wished to stop working immediately and obviously there must have been a discussion between Ms. Ward and the petitioner as to how the petitioner could leave work immediately when her resignation did not become effective until May 24, 1989. In turn, this obviously led to the discussion concerning severance and vacation pay which came to 30 days' of pay.

From the facts stated above, it would appear that Ms. Ward has some question approving this herself and discussed the situation with President Jones. After this discussion Ms. Ward either on her own or with the approval of Mr. Jones gave the petitioner her 30 days' pay and allowed her to leave her job. However, the effective date of the petitioner's resignation was still May 24, 1989.

Under the statute cited above and the case law interpreting those statutes, the Commissioner of Education has held that a tenured school employee cannot be terminated by resignation until the school board accepts that resignation. (Kozak v. Board of Education, Waterford Township, 1976 S.L.D. 633, Klinka v. Board of Education, Florence Township, OAL Dkt. No. EDU 645-83 and Hall v. Board of Education, Jefferson Township, decided May 1989). The respondent's action at its executive session on May 1, 1989, was not an acceptance of the petitioner's resignation. The respondent's minutes of that meeting indicate that the petitioner's resignation was received and discussed. To accept the resignation the respondent would have had to adopt a resolution or pass a motion accepting the petitioner's resignation. So even though the petitioner, as of May 1, 1989, had an intention to resign and had received advance pay for one month, there was still no acceptance of her resignation; a resignation which still would not become effective until May 24, 1989. However, prior to that date, on May 4, 1989, the petitioner withdrew her resignation. This was prior to any action by the respondent which would have accepted the resignation and prior to any event which could be interpreted as the resignation taking effect.

FINDINGS

Based upon the motion of the petitioner and the answer of the respondent, including evidence and exhibits, I **FIND** that on April 24, 1989, the petitioner submitted her resignation as a secretary to the administrative principal with the respondent. This resignation was not to become effective until May 24, 1989. The petitioner was paid up until May 24, 1989, through severance and vacation pay. The petitioner last worked on April 21, 1989. On May 4,. 1989, the petitioner withdrew her resignation prior to the respondent accepting it and prior to its effective date of May 24, 1989.

CONCLUSION

I **CONCLUDE** that the petitioner never resigned from her position as secretary to the administrative principal for the respondent. It is therefore **ORDERED** that the respondent be reinstated in her tenured position and that she receive back pay and all other benefits from April 21, 1989 until the date of her reinstatement. The respondent may deduct what was paid to the petitioner on April 24, 1989 to the extent that it has not been returned by the petitioner.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

DATE

ROBERT W. SCOTT, ALJ

3/14/90
DATE

Receipt Acknowledged:
DEPARTMENT OF EDUCATION

Mailed To Parties:

MAR 16 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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GWEN LIPPINCOTT,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE BOROUGH OF RIVERTON, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed, as have exceptions by respondent and replies by petitioner filed in accordance with N.J.A.C. 1:1-18.4.

In its exceptions, respondent (hereinafter "the Board") argues that the ALJ was mistaken in relying on the Board's failure to have adopted a formal resolution accepting petitioner's resignation to hold that petitioner was entitled as a matter of law to return to her tenured secretarial position. Instead, the Board argues, no such resolution was necessary because petitioner abandoned her position, with the Board's acquiescence, by asking for, receiving from the Board, and definitively acting upon permission to cease work immediately notwithstanding the express 30-day notice provision in her contract. In so holding, the Board notes:

> ***A teacher's contract of employment may be terminated by his abandonment of the contract and the acceptance of, or acquiescence in, the abandonment by the school board. This constitutes a rescission of the contract by mutual agreement***.
> (78 C.J.S. Schools and School Districts, Section 206 (1952), at p. 1103)

The Board further cites petitioner's contact with NJEA as evidence of abandoning a confidential position where such contact is expressly forbidden and constitutes a clear conflict of interest, and her acceptance of severance pay as a further indication of the finality of her actions.

Also excepted to is the ALJ's granting of summary judgment when, according to the Board, significant factual issues still exist. Moreover, in granting summary judgment, the ALJ failed to construe the facts that were before him in the manner most favorable to the party opposing the motion, as required by cases such as Judson v. People's Bank and Trust Company of Westfield, 17 N.J. 67, 74 (1954). Such construal, the Board argues, would have shown the need for a full hearing to conduct a proper weighing of equities in

this case. Finally, the Board argues that, if petitioner is to be reinstated, equities demand that it be without the back pay awarded by the ALJ, or at the very least, with pay subject to mitigation for monies earned in the interim (the unknown extent of such mitigation being yet another reason to require a full hearing).

In reply, petitioner objects to the Board's raising the issue of abandonment without having properly raised it in pleadings. Nonetheless, she notes that an absence of ten days constitutes at most temporary nonuse of duty, particularly in view of the fact that she promptly returned her severance pay and sought NJEA assistance in an obvious effort to regain a job which remained vacant during her brief absence. She also avers that the ALJ acted properly, indeed commendably, in handling the matter through summary judgment since there were no disputes over the material facts needed to decide the case as a matter of law, even if one were to pursue the Board's notion of abandonment.

Characterized as "red herrings" are the Board's arguments regarding contact with NJEA and acceptance of termination payments, since the former was neither unlawful nor improper in the present context and the latter has specifically been held not to constitute a waiver of employee rights (Shebar v. Sanyo Business Systems, 218 N.J. Super. 111 (App. Div. 1987), aff'd 111 N.J. 276 (1988)). Finally, petitioner argues against the Board's contention that, if she is restored to her position, she should not be entitled to back pay. Instead, she argues, since she is being restored to her position as matter of law rather than through a weighing of equities, there can be no basis for denying or reducing her salary (except by mitigation) from the date she attempted to return to work. Accordingly, petitioner urges the Commissioner to affirm the initial decision, order reinstatement with back pay less mitigation from May 4, 1989, give the parties sixty (60) days to resolve the amount of back pay and benefits due, and provide for a full hearing limited to the issue of back pay in the event the parties cannot reach agreement within the allotted time.

Upon careful review of this matter, the Commissioner concurs with the ALJ that petitioner must be restored to her tenured position as a matter of law because she rescinded her resignation prior to the Board's taking formal action to accept it.

In so determining, the Commissioner has considered the Board's argument of abandonment. However, he finds that a mere request to stop working before the actual effective date of a resignation cannot in itself be construed as abandoning a position in the same sense as failure to report to work, refusal to execute a contract, willful taking of unauthorized leave or other actions of the type which have been found in various jurisdictions to constitute abandonment. Indeed, the very act of resignation is an acknowledgement of responsibility toward a position and the employer, whereas abandonment implies both a desertion of actual duties and a repudiation of the most minimal employee obligations. Also worth observing is that the authority cited by the Board in support of its position, at the conclusion of the section from which the Board's quotation is taker and following the series of examples

of abandonment excerpted above, specifically notes that "[a] resignation not acted on cannot be construed as an abandonment where it is subsequently withdrawn." (78 C.J.S. Schools and School Districts, Section 206, at p. 1103)

Neither does the Commissioner find any merit in advancing contact with NJEA or acceptance of severance pay as further indications of abandonment. In the first instance, the Commissioner finds no indication in the record, nor does he generally believe, that such contact was prohibited or improper apart from the collective bargaining process, which was not implicated in this matter (cf. Exhibits B and F appended to the Board's brief before the ALJ); in the second, severance pay was part and parcel of petitioner's arrangement to cease work prior to the effective date of her resignation and therefore has no independent weight as an indicator of abandonment.*

The Commissioner also rejects the Board's argument that summary judgment was inappropriate in this case. As the ALJ recognized, the threshold issue herein is whether or not petitioner's resignation was accepted by the Board, and the record available at the time of summary judgment clearly provided all the material facts necessary to make that determination. Once made in petitioner's favor, entitlement as a matter of law rendered other considerations effectively moot.

In the matter of the Board's acceptance, the Commissioner concurs with the ALJ that, in order for an employee resignation to be binding and therefore irrevocable under most circumstances, it must be accepted by formal action of the board of education. Virtually every school law decision on attempted recissions refers to formal acceptance by the Board of Education as the line of demarcation beyond which an employee normally may not pass; in most of these, however, there was no dispute, and hence no discussion, about what constituted formal acceptance. See, for example, Kozak, supra; Klinka, supra; Hall, supra; Evaul v. Board of Education of the City of Camden, 35 N.J. 244; and Vivienne Pederson v. Board of Education of the Borough of Midland Park, 1977 S.L.D. 416.

However, two particular cases are germane to the issue at hand here, where the Board in effect is arguing that its "discussion" of petitioner's resignation constituted all the acceptance that was necessary under the circumstances. In Roy S. Austin v. Board of Education of the Township of Mahwah, 1955 S.L.D. 98, the Commissioner held that a resignation read into the record at a board meeting but not formally accepted by the board was null and void, while in Carol Cohen v. Board of Education of the Town of Hackettstown, 1979 S.L.D. 439, the Commissioner deemed a resignation accepted despite having no evidence of formal board action only because it would strain credibility to assume that the resignation

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* The Commissioner here notes that he is somewhat hesitant to apply Shebar, supra, to the facts herein, as that case dealt with termination pay upon involuntary discharge by an employer rather than upon resignation by an employee.

had not been properly accepted at some point during the year between Cohen's resignation and the matter then at hand.

In the present case, it is undisputed that the Board merely received information about and discussed petitioner's resignation, taking no recorded formal action of any type. Under the great weight of existing decisional law, this cannot be judged to have constituted proper acceptance regardless of the circumstances of the resignation. Notwithstanding the Board's apparently sincere belief that no further action was required because petitioner had stopped working and accepted severance pay, in failing to take official action to accept the resignation by motion or resolution, the Board acted at its own peril in leaving itself open to the possibility of a lawful rescission.*

Finally, the Commissioner concurs that, because petitioner's entitlement to her position is a matter of law, she must be granted back pay and benefits, less any monies paid on April 24, 1989 which have not yet been returned to the Board. However, the Commissioner modifies the determination of the ALJ to the extent that entitlement to back pay and benefits should only extend to May 4, 1989, the date of the attempted rescission, and that it should be subject to mitigation. Failure of the parties to agree on the amount due petitioner shall be deemed a new cause of action for which a petition of appeal may be filed with the Commissioner.

Accordingly, with the exception of the Commissioner's modification of entitlement on the issue of back pay, the initial decision of the Office of Administrative Law restoring Gwen Lippincott to her tenured secretarial position with the Riverton Board of Education is affirmed for the reasons stated therein and is hereby adopted as the final decision in this matter.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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* The Commissioner notes his awareness of Barry M. Silberstein v. Board of Education of the Township of Lakewood, Ocean County, decided March 23, 1990, wherein the Commissioner held that a board member's resignation was accepted upon its being acknowledged and read into the minutes of a public board meeting notwithstanding the fact that the board did not vote upon it, and that it therefore could not be rescinded. However, this case is distinguishable from the present matter in that it dealt with an elected school officer, for whom different standards of acceptance apply, rather than with a contracted school employee. Cf. 78 C.J.S. Schools and School Districts, Section 115 (1952).

IN THE MATTER OF THE TENURE	:	
HEARING OF RAYMOND L. SCHNITZER,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF SCOTCH	:	DECISION
PLAINS-FANWOOD, UNION COUNTY.	:	
	:	

In a decision dated November 15, 1989, the Commissioner of Education retained jurisdiction for determination as to penalty under limited circumstances described below in the above-captioned tenure hearing. The matter concerns a tenured assistant high school principal against whom charges of conduct unbecoming a teaching staff member were proved by the Board of Education. The charges proved against respondent as certified to the Commissioner were as follows:

> 1. Raymond L. Schnitzer placed illegal bets for an extended period of time both while on and off school property;
>
> 2. Raymond L. Schnitzer exchanged money (paying and receiving) as a result of the illegal gambling on a weekly basis with a known bookmaker with possible criminal organization ties on school property over an extended period of time;
>
> 3. By the course of the aforesaid conduct of Raymond L. Schnitzer, Raymond L. Schnitzer exposed not only the school system of Scotch Plains-Fanwood, but his colleagues and students to an illegal activity occurring on school property over an extended period of time; and
>
> 4. The above charges constitute conduct unbecoming a school employee and other just cause pursuant to [N.J.S.A. 18A:6-10 et seq.]. (Initial Decision, at p. 2)

In so concluding the Commissioner adopted as his own the following findings and conclusions of the Office of Administrative Law:

> ***Despite the circumstances that respondent may have gambled only on his own account as a player, it is also clear that he gambled with more than his own money. He risked loss of the trust, respect and confidence of students, tax payers and colleagues in his profession, to say nothing of that of citizens of the district. He risked bringing himself and his scholastic environment into disrepute. I find especially inappropriate respondent's urging that what he did on school property and with school telephone instrumentalities was limited, inoffensive, non-notorious or not disruptive of school activities or his school duties. The plain circumstance is that respondent's activities did become notorious to a police confidential informant. There followed, in turn, the disturbing circumstance of police surveillance on school property that confirmed respondent's dealings with a known gambler. That respondent never himself never became a subject of criminal prosecution or that respondent when confronted by police authorities offered his "cooperation" to them does not, in my view, lessen the discreditability of his conduct. He could hardly be expected to offer less; nor, perhaps, could his sudden emotional and physical collapse remain unexpectable. (Id., at p. 11)

(See also, Commissioner's Decision, at p. 19.)

However, in then reviewing the record for determination of a penalty for said unbecoming conduct, the Commissioner was troubled by respondent's apparent lack of remorse for his wrongful behavior, as evidence by his statement in response to the ALJ's inquiry as to whether he believed his conduct was unbecoming a teaching staff member. Respondent responded in the negative. The Commissioner observed that said remorseless attitude could signal "deviation from normal mental health," pursuant to N.J.S.A. 18A:16-2, as a result of compulsive behavior. (Commissioner's Decision, at p. 22) In light of this consideration, the Commissioner ordered a psychiatric evaluation. He further directed as follows:

> ***If such evaluation should support a conclusion that respondent suffers from deviation from normal mental health as a result of compulsive behavior, the Commissioner further directs him to undergo a course of treatment for such deviation such as Gamblers Anonymous for which he can demonstrate satisfactory completion. While the Commissioner recognizes that N.J.S.A. 18A:16-4 speakes to "proof of recovery," in matters of this sort recovery is not guaranteed. Thus, satisfactory completion of a rehabilitation program certified by the organizers of the program to the Board shall satisfy the prescriptions of

> the statute in this regard. Until such time as he can demonstrate to the Board's satisfaction "proof of recovery," in this manner, respondent shall not be restored to his tenured status. Further, it shall be the option of the Board, pursuant to N.J.S.A. 18A:16-4, to determine whether respondent shall be permitted to use his accumulated sick time, pursuant to the aforesaid statute, should he enter such program. Should the Board permit respondent to use his accumulated sick days during any period of rehabilitation, the 20% salary reduction directed by the ALJ and affirmed herein by the Commissioner shall be deducted from his sick leave pay. Alternatively, should the Board exercise its option to deny sick leave pay during rehabilitation, then such penalty shall be imposed upon his restoration, when and if forthcoming.
>
> If the psychiatric examination, on the other hand, reveals no deviation from normal mental health, the Commissioner directs the matter be returned to him for further determination as to penalty. Only under the circumstance that respondent is found not to be suffering from a deviation from normal mental health does the Commissioner retain jurisdiction of this case.
>
> Moreover, the Commissioner directs such psychiatric examination be conducted immediately and that respondent shall remain on suspension during said examination. Choice of the psychiatrist to conduct said examination shall be selected in conformity with N.J.S.A. 18A:16-3.
>
> (Commissioner's Decision, at pp. 22-23)

By letter dated March 20, 1990, respondent's counsel submitted two psychiatric reports, the first from Robert T. Latimer, M.D., P.A., and the second from Peter M. Crain, M.D. In so submitting these documents to the Commissioner, respondent's counsel again argues for respondent's reinstatement relying on the arguments proffered at the hearing and in his post-hearing submissions. Counsel for respondent emphatically attests to Mr. Schnitzer's state of remorse as documented in both psychiatric evaluations. In reply to respondent's comments on remand, the Board reiterates its position that assessment of penalty is a matter for the Commissioner to decide, not for the Board to adjudge.

Initially, the Commissioner would note that in referring respondent to these psychiatrists, both Board counsel and respondent's counsel instructed the doctors, via cover letter, as to their purposes in so doing. Identical as to the facts, said letters also included the following identical instruction to the physicians:

> The Commissioner determined that Mr. Schnitzer engaged in conduct unbecoming a teaching staff

> member. As part of the remedy, the Commissioner ordered Mr. Schnitzer to undergo a psychiatric evaluation. The Commissioner concluded that Mr. Schnitzer may resume his duties "only upon a determination of his fitness to return unhampered by gambling." The Commissioner determined that the evaluation should be undertaken toward a determination as to whether Mr. Schnitzer suffers from "a deviation from normal mental health as a result of compulsive behavior." The standard of "deviation from normal mental health" has been construed by the courts to mean "harmful, significant deviation from mental health affecting the teacher's ability to teach, discipline or associate with children of the age of the children subject to a teacher's control in a school district." Kochman v. Keansburg Board of Education, 124 N.J. Super. 203, 212 (Ch. Div. 1973)
>
> Please prepare a comprehensive evaluation of Mr. Schnitzer based upon the Commissioner's instructions outline[d] above. Please include in your report a discussion of the methodology used for your evaluation. Please forward the report to both myself and to Mr. Schnitzer's attorney, whose address is indicated below.
> (Letters dated February 22, 1990 and March 1, 1990 to Drs. Latimer and Crain, respectively)

The Commissioner finds that the above instruction inappropriately casts the purpose of the psychiatric reports he directed. The Commissioner's purpose in directing the psychiatric examination was solely for the purpose of determining whether respondent was physically or mentally impaired by a compulsion to gamble, which the two psychiatrists agree is not the case. However, the purpose of the Commissioner's retaining jurisdiction upon a finding that respondent was not so impaired was to then determine, notwithstanding any lack of deviation from normal mental health, whether respondent's return to his administrative role is in the best interests of the district, students, staff and the teaching profession.

In conducting his review of the psychiatric reports, the Commissioner is particularly struck by the following paragraph of Dr. Crain's evaluation:

> OPINION: Mr. Schnitzer does not fit the criteria for pathological gambling by either the South Oaks Gambling Screen or the criteria established by the American Psychiatric Association. He has shown a serious lapse in judgment, meeting with the bookmaker surreptitiously in the school parking lot, "trying to get away with something" just as the students that he has counseled in the course of his duties. I am unable to identify a

> significant source of stress in his life that would account for such behavior. The fact that the gambling was allowed to intrude in the way described would indicate that the gambling did compromise his judgment.
>
> I believe that Mr. Schnitzer did have a gambling problem, but this was not sufficient to satisfy the criteria for a mental disorder or a "deviation from normal mental health." He thought that he could "get way with something." Such behavior would not provide a suitable role model for the students that he was counseling, adolescents in high school.
> (Psychiatric Report of Dr. Crain, dated January 5, 1990, at p. 3)

While respondent now vociferously avows remorse for his lapse in judgment, (id.) the Commissioner is persuaded by the totality of the record before him that the illegal conduct respondent demonstrated over the course of time between the fall of 1987 and February 1988 requires a penalty greater than that assessed by the ALJ.

In so deciding, the Commissioner first notes the repetitive pattern of the gambling. Respondent has admitted that he thought his actions in meeting his bookmaker during school time on school grounds and, also, in using Board telephones to contact his bookie, was so discreetly managed as to be acceptable conduct. That such behavior persisted, regularly, day after day, week after week, month after month, unchecked until police authorities intervened, speaks to the proposition mentioned by Dr. Crain that respondent thought he could "get away with" his illicit activity and, further, that such behavior was not reprehensible.

Moreover, the Commissioner is acutely mindful, in assessing the penalty appropriate for such unbecoming conduct, of the administrative position respondent held in the district. Dr. Crain's report notes respondent's own summary of his job responsibilities as follows:

> DISCUSSION: Mr. Schnitzer tells me that his job as Vice Principal involved student behavior and discipline. Various school staff would refer to him students with behavior problems. He would counsel that student, decide what course of action to take, as well as decide when a suspension was in order. He chaired the committee that would consider proposed expulsions. He gave lectures to students on proper conduct, the need to admit to mistakes and take proper action.
> (Report from Dr. Crain, at p. 3)

Respondent's actions unquestionably taint any interaction he might have with the students and faculty with whom he is charged with working. Respondent has been slow to admit wrongdoing, without the excuse of compulsion to mitigate the consequences of his actions. While the quality of mercy is not strained in forgiving respondent for his unbecoming conduct, his effectiveness as a counselor, supervisor and role model to pupils and staff alike is, in the Commissioner's judgment, severely damaged by his course of action involving "Joe the Bookmaker." In this regard, the Commissioner finds distinguishable the case captioned In the Matter of the Tenure Hearing of Rumage, School District of the Township of Woodbridge, Middlesex County, decided by the Commissioner July 22, 1980.

In that case, a district guidance counselor was found guilty of conspiracy and bookmaking, sentenced to serve three months in a correctional center, fined and placed on probation for two years. He was reinstated to his guidance position with forfeiture of two months' salary. In Rumage, however, the Commissioner affirmed the ALJ's reliance on a case captioned In the Matter of the Tenure Hearing of Kane, 1975 S.L.D. 188 to determine that Rumage should not be dismissed from his tenured position. The ALJ stated:

> Most relevant to the instant matter is the case of In re Tenure Hearing of Kane, 75 S.L.D. 188, where a tenured janitor pleaded guilty to working a lottery. There were no complaints about the janitor's work, as the tenure charges rested upon the facts underlying his conviction. Although his action was deemed improper, the Commissioner indicated that it constituted a solitary incident in an otherwise unblemished record. The lottery in question did not involve the pupils or employees of the school, the acts occurred away from school property and there was no indication that the matter was generally discussed in school. This tribunal finds Kane most persuasive in the case at bar. The Rumage tenure charges rest solely upon the conviction. There is no evidence whatsoever that the crime involved pupils or employees, that it occurred on or near school grounds, or that the matter was generally discussed. To the contrary, there have been extensive findings of fact, stipulated by the Board of Education, that Mr. Rumage is a dedicated, devoted and excellent guidance counsellor. The Court concludes that examination of the specific circumstances have shown that the offense was an isolated incident in an exemplary career and did not involve students or occur on school property during school hours.
>
> The reasoning of Kittell, Buch, and Kane is applicable to Rumage. As in those cases, Mr. Rumage's conduct was unbecoming a teacher,

and he does not contest the fact that the conviction and its underlying circumstances were improper and cannot be condoned.***

(Slip Opinion, at pp. 5-6)

By contrast, in the instant matter, respondent brought an undesirable element onto school property, repeatedly. Moreover, he repeatedly employed the use of school telephones, even on days when he had no other reason to be in the building, as often as 6 times in one day, to summon the bookmaker to the school or to place bets over the school telephone. He thus visited disrepute upon the district. Such blatant behavior demonstrates an utter disregard for the public trust, made the more egregious in his reluctance to recognize the implications of his actions until such time as he recognized his future employment was in jeopardy as a result of this matter having been referred for a psychiatric evaluation. So deleterious a breach of ethical and professional conduct compels a penalty that will indelibly impress upon respondent that such vice will not be tolerated in our public schools.

Thus, the Commissioner concludes that respondent was a willing participant in illicit conduct in and on school property for a lengthy period of time. He was not a victim of gambling compulsion but, instead, willfully and surreptitiously compromised the position of trust and leadership he held as vice principal in the Board's employ.

Accordingly, for the reasons expressed above, respondent shall hereby forfeit the 120 days' salary paid pursuant to N.J.S.A. 18A:6-14. In addition, respondent is hereby suspended without pay from service to the Scotch Plains-Fanwood School District commencing the date of this decision and ending June 30, 1991. When respondent thereafter returns to service, it shall be at the same salary he enjoyed at the time of his suspension without pay on December 15, 1988. The Commissioner thus modifies the initial decision as to penalty rendered by the Office of Administrative Law and suspends respondent from his tenured employment in the Scotch Plains-Fanwood School District effective the date of this decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8323-89
AGENCY DKT. NO. 334-10/89

L.B., ON BEHALF OF HIS MINOR CHILD, S.B.,
Petitioner,
v.
BOARD OF EDUCATION OF
TOWNSHIP OF HILLSBOROUGH AND
DR. MICHAEL CAREY-SUPERINTENDENT,
Respondents.

L.B., petitioner, pro se

Louis Rosen, Esq., for respondents

Record Closed: February 14, 1990 Decided: March 19, 1990

BEFORE JEFF S. MASIN, ALJ:

L.B., father of S.B., brings this action against the Board of Education of Hillsborough and its superintendent of schools, alleging that the Board improperly removed his daughter from the first grade and placed her in kindergarten. He seeks to have her returned to first grade.

After failing to resolve his dispute with the Board, Mr. B. filed a petition with the Commissioner of Education. He asked for a stay of the Board's action returning his daughter to kindergarten. The matter was heard on an emergency basis by Honorable Joseph Lavery, ALJ on November 1, 1989. In a decision of November 3, 1989, Judge Lavery concluded that the application for emergent relief should be denied.

The case was transferred for plenary hearing to Administrative Law Judge Jeff S. Masin, who heard the matter on February 14, 1990, at the Office of Administrative Law in Mercerville. The record closed following the conclusion of the hearing.

EVIDENCE

Initially, the parties agreed that a series of undisputed facts set forth in Judge Lavery's opinion of November 3, 1989 could be stipulated as facts for purposes of the plenary hearing. These facts are set forth below and accepted as findings of fact for purposes of this opinion.

Stipulated Facts

S.B. is now a child of six years, whose birthday falls on October 23. One school year ago, at the beginning of the 1988-89 session, petitioner had sought to enter his daughter, S. B. in the kindergarten class of the Woods Road Elementary School, located in the Hillsborough School District. This application was rejected, because the child had not then attained the age of five on or before October 1. This cut-off was the policy of the Board of Education for Hillsborough Township (Exhibit R-9). The child had earlier attended the program for preschoolers during the years 1986-87 and 1987-88 in the Raritan Valley Montessori School.

With enrollment in Woods Road blocked, L.B. took the alternative step of enrolling his daughter in the kindergarten of the Burnt Hill Road Elementary School, which was outside the Hillsborough School District. She was placed there under a tuition arrangement, and completed the full year.

At the beginning of the following, and current, school year of 1989-90, L.B. again sought to place his daughter in the Woods Road Elementary School, but in a higher grade. On the afternoon preceding the first day of school, L.B. came to Woods Road, and asked that his daughter now be placed in Grade 1. The principal of that school, Theodore Smith, allowed the enrollment, subject to testing. Board policy left room for placement despite the appropriate age cut-off, on an exceptional basis. Principal Smith conditionally (subject to testing) granted the exception even though, under the same Board policy, the decision was to be made before September 1. For Woods Road, the school year began on September 6.

Within the first two weeks of S.B.'s Grade 1 attendance, the classroom kindergarten teacher, **Jane Dilks,** felt it necessary to observe her work. She brought her observations to Principal Smith, stating that the child was having difficulty with both math and reading, as well as with assimilation into the activities of the class. Ms. Dilks thought that the child was unready for first grade. At the direction of Principal Smith, testing followed. From September 11 through September 13, 1989, reading tests were administered, and on September 12, 14 and 18, a math test was given to S.B The results of both suggested to the testing teachers, Ms. Dilks, and Principal Smith that the child lacked those skills needed for success in the Grade 1 program.

On September 19, 1989, Principal Smith met with Mrs. L.B. in the presence of the two testing teachers: Carol Hartway, the math resource teacher, and Julia Bacso, the reading resource teacher, as well as first grade teacher Mrs. Dilks. He explained that the child lacked the readiness to absorb first grade teaching. Mrs. L.B. disagreed. Subsequently, Principal Smith directed that a Gesell test measuring developmental age be administered. Mrs. Mullady administered that test on September 30, 1989 (Exhibit R-13). It placed S.B. at a developmental age of five, with tendencies toward four and one-half. The testing comments suggested an inability to focus on one task persistently, a continuing need for direction, and a lack of self-confidence.

Subsequently, the parents met with Principal Smith and Assistant Superintendent Robert Gulick on October 20 without resolving the dispute. The position of the school district was upheld by Superintendent of Schools Michael F. Carey, the child was reassigned to kindergarten, and these proceedings ensued.

Additional Testimony

L.B. testified that at the time his child was enrolled in the Woods Road Elementary School he was not aware that his child was to be subject to testing. Although the stipulated facts indicated that he had enrolled his child, he testified that his wife in fact enrolled her. He became aware of the testing at the time of his daughter's first reporting that she was being tested. He believed that she was a "normal" transfer student and that if there were any problems with her work in first grade she should have offered a remedial program rather than being transferred back to kindergarten.

Mr. B. acknowledged that he knew at the time his daughter was enrolled in Woods Road that she was under age. He also acknowledged that she was tested by Hillsborough in 1988 and found to be unready for kindergarten. However, when he appealed this determination to the Board of Education and they rejected his appeal he did not attempt to appeal the matter further to the Commissioner of Education.

Mr. B. noted that the Montgomery Township School District, the district in which his daughter had attended kindergarten, had promoted her to the first grade. B. contended that if he had known that the Hillsborough District had placed conditions on his daughter's admission into first grade he might have left her in Burnt Hill Road Elementary School in Montgomery Township.

Mr. B. acknowledged that since his daughter has been returned to kindergarten she has been performing satisfactorily, has been happy and relating well and has expressed no dissatisfaction. However, he also noted that she was quite happy in first grade.

BOARD POLICIES

The school board policy with respect to admission to first grade is:

> A child is eligible for entrance into first grade who will have obtained the age of six years on or before (1) October of the year in which entrance is sought or has completed the kindergarten program of this district or an equivalent program elsewhere and has been recommended by the administration for advancement to the first grade.

The statutory authorization for the Board's policy arises from N.J.S.A. 18A:38-5, which reads in pertinent part:

> No board of education shall be required to accept by transfer from public or private school any pupil who was not eligible by reason of age for admission on October 1 of that school year, but the Board may in its discretion admit any such pupil if he or she meets such entrance requirements as may be established by rules or regulations of the Board

A Board of Education is authorized to make rules for the government and management of the public schools so long as they are not inconsistent with education statutes and state board regulations N.J.S.A. 18A:11-1.

DISCUSSION AND CONCLUSION

Based upon the stipulated facts, I FIND that at the time that S.B. was admitted to the Woods Road Elementary School in Hillsborough Township she was not yet six years old. She did not turn 6 until October 23, 1989, which was 23 days after the cut-off date established in the statute and the Board policy. Thus, the only way that she could qualify for admission into the first grade would have been for Hillsborough to have determined that the kindergarten program in Montgomery Township was equivalent to Hillsborough's and for the Hillsborough School administration to have recommended that the child be advanced to the first grade. This policy, which clearly is authorized by N.J.S.A. 18A:38-5, requires more than the mere completion of an equivalent kindergarten program. The Board of Education has retained to itself the right to determine whether in its view the child is in fact ready to advance, even where the child has been graduated from an equivalent program. Since boards of education generally are charged with the managements of their districts and are responsible for the maintenance of standards, including those involving promotion, N.J.S.A. 18A:4-24, there is nothing improper in the Board exercising its discretion to determine which graduates of equivalent programs shall be advanced and which shall not. So long as the determination is made in a reasonable fashion and is not arbitrary, capricious and unreasonable, there is no basis for the Commissioner to overturn the local board's decision. Shenkler v. Bd. of Ed. of Ho-Ho-Kus, 1974 S.L.D. 772, 779.

In the present case, the evidence reveals that rather than refusing outright to admit the child into first grade, the Board, through the school principal, determined to allow her to begin first grade, subject to a testing requirement. Although Mr. B. professed to have been unaware of the testing requirement, he admitted that he was not the individual who actually enrolled his daughter. His wife did not testify. Thus, Mr. B.'s knowledge of the exact arrangements under which his daughter was permitted to enter first grade is at best second-hand.

It must be noted that Mrs. B. presented her daughter for admission just prior to the first of September. Under these circumstances, there was little time for any pre-entrance testing to occur prior to the opening of school of September 6 and the principal permitted the child to begin first grade, subject to testing. The evidence presented indicates that the child's homeroom teacher soon noted that the child was having difficulty keeping up with first-grade level work, or properly relating to the classsroom. In addition, the testing, revealed deficits which suggested to the testors

that the child would do better to return to a kindergarten program and strengthen her basic skills.

Having reviewed the evidence presented, it is clear that, although Mr. B. certainly has his child's best interests at heart, in this matter the view of the professional educators as to his daughter's lack of preparedness for first grade is appropriate. Although it may well be that the prior kindergarten program presented the child with all of the skills training which she needed to be prepared to continue on in first grade in the Hillsborough schools, children develop at different rates and apparently this child, who admittedly was underage as of the time of admission to first grade, was not quite ready to handle the work. Whether this is as a result of a lack of maturation, emotional factors, etc. is not easily ascertainable. Regardless, the Board's determination to require that she be returned to kindergarten was clearly within its discretion and was in no way tinged with any sense of arbitrariness. Therefore, I **CONCLUDE** that the petition must be **DENIED**. It is so **ORDERED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

Date

JEFF S. MASIN, ALJ

Receipt Acknowledged:

March 20, 1990
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 23 1990
Date

OFFICE OF ADMINISTRATIVE LAW

jz

L.B., on behalf of his minor child, S.B.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HILLSBOROUGH AND DR. MICHAEL CAREY, SUPERINTENDENT, SOMERSET COUNTY,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon a careful and independent review of the record of this matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the Board's action in returning S.B. to kindergarten, under the circumstances of the instant matter, was an appropriate, reasonable extension of the Board's discretionary authority. In so deciding, the Commissioner is mindful of case law establishing that a pupil, who is of age and who has transferred after satisfactory completion of a public kindergarten, has the right to enter first grade. See Leslie M. Shenkler v. Board of Education of the Borough of Ho-Ho-Kus, 1974 S.L.D. 772, aff'd State Board 1975 S.L.D. 1157. However, it also bears noting that a district board of education is imbued with the authority to reevaluate performance of any given pupil, where warranted.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6889-89
AGENCY DKT. NO. 275-8/89

KATHARINE LE MEE,
Petitioner,
v.
BOARD OF EDUCATION OF
THE VILLAGE OF RIDGEWOOD,
Respondent.

Harold N. Springstead, Esq. for petitioner
(Aronsohn, Springstead & Weiner, attorneys)

James L. Plosia Jr., Esq. for respondent
(Sills, Cummis, Zuckerman, Radin, Tischman, Epstein, & Gross, attorneys)

Record Closed: February 8, 1990 Decided: March 14, 1990

BEFORE KEN R. SPRINGER, :

Statement of the Case

This is an appeal by a nontenured teacher who challenges the nonrenewal of her teaching contract for the 1989-90 school year. She claims to be the victim of age discrimination, and that the actions of her former employer are tainted by "fraud, coercion, deceit and conspiracy." Respondent Ridgewood Board of Education

("Board") denies these allegations and contends that its decision was made for valid educational reasons. Presently the matter comes before the Office of Administrative Law ("OAL") on respondent's motion to dismiss the suit on alternate grounds: (1) because it is time-barred under the 90-day rule, N.J.A.C. 6:24-1.2(b); and, (2) because the pleadings fail to state a claim for which relief can be granted. For the reasons which follow, the petition will be dismissed for untimeliness, without reaching the substantive merits of the controversy.

Procedural History

Petitioner filed her verified petition with the Commissioner on August 21, 1989. The Board filed its answer on September 12, 1989. Subsequently, on September 14, 1989, the Commissioner transmitted the file to the OAL for handling as a contested case.

On January 17, 1990, the Board filed its motion papers, together with supporting certification and brief. Petitioner filed opposing certifications and brief on January 31, 1990. Then the Board filed reply papers on February 8, 1990. Now the matter is ready for ruling on the papers. *N.J.A.C.* 1:1-12.2(e).

Findings of Fact

At this stage of the proceeding, the facts and any inferences to be drawn therefrom must be viewed in a light most favorable to the party opposing the motion. All of the material facts necessary for a full and fair resolution of the pending motion are undisputed. **I FIND:**

Dr. Katharine Le Mee, age 50, holds a doctorate degree from Columbia University and has taught foreign language at various levels from grade school through college for the last 28 years. She began employment in Ridgewood as a high school French teacher in 1986-87. Her contract was renewed for 1987-88 and 1988-89. During her first two years of employment, the department supervisor who evaluated her performance rated her "superior" in every category. In 1988-89, however, she received unfavorable ratings in observations performed by her building principal. Moreover, her immediate supervisor suddenly retracted an earlier

recommendation that she be granted tenure and downgraded her rating for that year to only "good" or "average" in several categories.[1]

If the Board had offered her another contract for 1989-90, Dr. Le Mee would have obtained tenure in her position. Instead, the Board voted on April 10, 1989 to deny her a fourth successive teaching contract. Two days later, the district's personnel director wrote to Dr. Le Mee informing her of the Board's decision and explaining its reasons. According to this letter, recent evaluation had shown that that the atmosphere in her classroom "lack[ed] animation, enthusiasm and a sense of interested participation;" that student motivation was "weak;" that "discipline problems [were] evident;" and, generally, that she had "failed to meet the Ridgewood criterion of clearly superior performance."

Although Dr. Le Mee first received notice of the Board's action in mid-April 1989, more than 130 days elapsed before she filed her appeal with the Commissioner on August 21, 1989. As early as June 22, 1989, the supervisor had confided to her that he regretted his involvement in her nonrenewal and was willing to testify on her behalf in any legal proceeding. Yet Dr. Le Mee admits that the same supervisor "asked her to delay as long as possible the filing of any action" because of his own difficulties with the Board, and that she "passed this information along to [her] attorney."

Meanwhile, the Board afforded Dr. Le Mee the opportunity for an "informal appearance" on May 8 and 22, 1989, at which she or her representative made an oral statement and presented "voluminous" documentary evidence. No mention is made

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[1]There are unresolved conflicting versions of the circumstances surrounding the evaluation process. Basically, Dr. Le Mee contends that her principal wanted to save money by hiring a younger teacher to replace her and that he threatened retaliation against her immediate supervisor unless he went along. In a sworn certification, the supervisor corroborates that the principal "badgered" him to change his assessment of Dr. Le Mee's job perfomance and "ordered" him to recommend against tenure. But in a counter-certification, the principal relies on his own personal observations of petitioner's teaching ability and denies exerting improper pressure on the supervisor. It is unnecessary to resolve the factual dispute in order to decide the narrow question raised under the 90-day rule.

in the moving papers of the taking of any testimony under oath or the cross-examination of any witnesses. Petitioner's attorney concedes in his brief that the Board granted her the opportunity for this "hearing" even though legally it "was not bound to do so." [2] Immediately thereafter, on May 23, 1989, the Board notified petitioner in writing that it had voted "to sustain its original decision not to offer [her] a contract for the 1989-90 school year." However, petitioner waited exactly 90 days after this confirmation of the Board's original decision before instituting the present appeal to the Commissioner.

Conclusions of Law

Based on the foregoing facts and the applicable law, I **CONCLUDE** that the petition must be dismissed for failure to comply with the time limits on filing appeals to the Commissioner.

N.J.A.C. 6:24-1.2 prescribes that "[t]he petitioner shall file a petition no later than the 90th day from the date of receipt of the notice of a final order, ruling or other action by the district board of education which is the subject of the requested contested hearing." Prompt filing of actions before the Commissioner serves to preserve the immediacy of the record and to stabilize existing relations, thereby avoiding disruption of the educational process. *Newman v. Bd. of Ed. of Spring Lake Heights*, 1984 *S.L.D.* __ (Comm'r Jan. 19, 1984). Case law establishes that this regulation cannot cut off statutory entitlements, but does preclude late filing of claims attacking managerial prerogatives, such as the withholding of a salary increment. *North Plainfield Ed. Ass'n v. North Plainfield Bd. of Ed.*, 96 *N.J.* 587 (1984). Probationary teachers have no statutory right to re-employment, but are subject to "a board's virtually unlimited discretion in hiring or renewing nontenured teachers." *Dore v. Bedminster Tp. Bd. of Ed.*, 185 *N.J. Super.* 447, 453 (App. Div. 1982). See also, *Wyckoff Bd. of Ed. v. Wyckoff Ed. Ass'n*, 168 *N.J. Super.* 479 (App. Div. 1979). Teaching staff members whose contracts are not renewed have the right to obtain a written statement of reasons, as was provided by the Board in this

[2]While a formal hearing is not required, "a timely request for informal appearance before the board should ordinarily be granted even though no fomral hearing is undertaken." *Donaldson v. North Wildwood Bd. of Ed.*, 65 *N.J.* 236, 246 (1974).

instance. *N.J.S.A.* 18A:27-3.2. *Donaldson v. North Wildwood Bd. of Ed.*, 65 *N.J.* 236 (1974).

Both parties agree that the 90-day rule applies to nonrenewal of the contract of an untenured teacher, but differ as to what constitutes a "final" board action triggering the running of the limitation period. Petitioner urges that the 90 days only started to run on May 23, 1989 after the Board had afforded her a "hearing" and "voted to sustain its original decision." The Board takes the position that petitioner's cause of action accrued earlier on April 12, 1989 when it notified her that her contract would not be renewed for the following school year.

A recent Commissioner's ruling in favor of a school board is dispositive of the similar issues in the present case. In *Pacio v. Bd. of Ed. of Lakeland Reg. H.S. Dist.*, 1989 *S.L.D.* __ (Comm'r June 24, 1989), a local board voted on April 19th not to renew a nontenured teacher's contract and notified her on May 2nd of the reasons for its action. Like the instant matter, the teacher in *Pacio* sought to convince the board to reverse itself, culminating in a vote by the board on May 24th "to affirm its previous decision."

Dismissing as untimely a suit filed beyond the 90-day limit, the Commissioner in *Pacio* held that the controversy arose on May 2nd, "because this date represents when she unquestionably received a written notice from the Board of its 'final determination' not to renew her contract."(slip op. at 11). Significantly, the Commissioner adopted the reasoning of the administrative law judge that "[p]etitioner could not expand that time period by continually requesting the Board to reconsider its action . . . and to change its reasons for the nonrenewal." (slip op. at 3). Requests to a school board for reconsideration of its earlier decision "do not toll the running of the 90-day rule." (slip op. at 11). No date beyond May 2nd need be considered, because "the Board's final determination not to renew petitioner's contract was made known to her no later than [that date.] " (slip op. at 12). Here Dr. Le Mee had notice of her nonrenewal on or about April 12, 1989 and that is the starting point for the running of the 90 days. A cause of action accrues, so that the applicable period of limitation commences to run, when the party seeking to bring the action has an enforceable right. *Andreaggi v. Relis*, 171 *N.J. Super.* 203, 235-36 (Ch. Div. 1979).

Petitioner tries unsuccessfully to distinguish the *Pacio* case on the slender ground that Dr. Le Mee was given a full "hearing" before the Board, whereas Pacio purportedly was not. Actually Dr. Le Mee received an "informal appearance" rather than a "hearing" in any formal sense. Indeed, she received much the same treatment as in *Pacio*, where parents and other interested persons spoke on behalf of the terminated teacher at a subsequent board meeting. In any event, the outcome should not turn on the apparent willingness of the school board to permit a public airing of its deliberations. Certainly the Board should not be any worse off because it may have gone beyond what the law absolutely requires in allowing an employee to express her dissatisfaction with the Board's decision.

Additionally, Dr. Le Mee requests that the Commissioner exercise his authority under *N.J.A.C.* 6:24-1.17 to relax application of the 90-day rule "where strict adherence thereto may be deemed inappropriate or unnecessary or may result in injustice." Exceptions to the 90-day rule should be granted sparingly, and only where there exist compelling circumstances to justify enlargement or relaxation of the time limit. See *Riely v. Bd. of Ed. of Hunterdon Cent. H.S.*, 173 *N.J. Super.* 109 (App. Div. 1980); *Weir v. Bd. of Ed. of N. Valley Reg. H.S. Dist.*, 1984 *S.L.D.* __ (Comm'r July 20, 1984), aff'd No,. A-3520-84T6, slip op. at 6 (N.J. App. Div. April 9, 1986); *Bogart v. East Orange Bd. of Ed.*, 1983 *S.L.D.* __ (Comm'r March 14, 1983). Equitable considerations which might allow relaxation of the rule include good faith discussions between parties to resolve the dispute, *Polaha v. Buena Reg. Sch. Dist.*, No. A-1359-85T7 (N.J. App. Div. Oct. 7, 1986), delay attributable solely to the board of education, *Perrotti v. Newark Bd. of Ed.*, 1981 *S.L.D.* __ (Comm'r May 11, 1981), aff'd (St. Bd. Sept. 2, 1981), or cases presenting a substantial constitutional issue or matter of significant public interest, *Miller v. Morris Sch. Dist.*, 1980 *S.L.D.* __ (Comm'r Feb. 27, 1980).

Again the approach taken in *Pacio* is instructive. At the heart of every tenure denial case is a disagreement over the ostensible reasons for nonrenewal. While recognizing the obvious importance of employment rights to the individual involved, the Commissioner does not regard such "harsh result" as sufficient justification to extend the time for filing an appeal. "[S]imply because petitioner does not like the reasons for her nonrenewal, provided by the Board when she

requested them, does not mean that petitioner has posed a matter of substantial public interest." *Pacio*, slip op. at 4-5.

In our own case, Dr. Le Mee was clearly aware in mid-April 1989 that the Board had decided not to renew her contract and that the stated reason was her failure to meet the high academic standards of the district. Not only was she fully aware of her employment situation, but also she had a potential witness ready to testify on her behalf if necessary. Yet she intentionally delayed challenging the Board's action until late August 1989, just weeks before the beginning of the next school year. If any overriding public interest is truly implicated, it is the desirability of resolving such controversies as quickly and efficiently as possible, so that school administrators can realistically prepare for the future, so that the children know who their teacher will be, and so that the Board will not incur unnecessary expense if ultimately petitioner should prevail on appeal. Against such weighty considerations, Dr. Le Mee has not shown a sufficiently compelling reason to excuse her dilatory conduct.

Order

It is **ORDERED** that the petition in this matter is dismissed.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with *N.J.S.A.* 52:14B-10(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration

March 14, 1990
Date

Ken R. Springer
KEN R. SPRINGER, ALJ

Receipt Acknowledged:

March 20, 1990
Date

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed to Parties:

MAR 20 1990
Date

James A. Virella
OFFICE OF ADMINISTRATIVE LAW

al

KATHARINE LE MEE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE VILLAGE OF RIDGEWOOD, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed, as have timely exceptions by petitioner and replies thereto by respondent filed in accordance with N.J.A.C. 1:1-18.4.

In her exceptions, petitioner first avers that the ALJ failed to construe the facts before him in the light most favorable to her as he claims to have done at page 2 of the initial decision. Rather, she contends that those facts, properly interpreted, plainly demonstrate that the less than superior evaluations which formed the basis for her nonrenewal were faulty in both substance and execution, and that they were merely a pretext devised by the principal (Dr. Honsinger) to effect his stated desire to save money by hiring a younger, less expensive teacher in her place. She further distinguishes the facts of her own case from those of Pacio, supra, relied on by the ALJ, in that Pacio simply disagreed with the reasons for her nonrenewal while petitioner herein is alleging fraud, deceit, coercion and conspiracy.

Petitioner also objects to the ALJ's refusal to relax the 90-day rule, noting that although her petition was untimely filed reckoning from her notice of nonrenewal, it was filed within 90 days of the Board's decision to affirm the nonrenewal after granting her a hearing; and that the possibility of age discrimination and improper evaluations in a public school system is of sufficient public importance to override strict adherence to the letter of the law.

In reply, the Board initially objects to petitioner's version of the facts, characterizing many of her statements as speculation either unsupported by the record or contradicted by the certification of Dr. Honsinger, which is no less valid than the certification of Fernando Gomez on which petitioner in large part relies. It further notes that the ALJ was correct in deeming these factual disputes irrelevant to the narrower 90-day question, as two undisputed facts were responsible for dismissal of the petition: Gomez's request, conveyed to petitioner's attorney, that the petition be filed as late as possible because of his own difficulties with the Board, and the fact that the Board was not legally bound to grant a hearing after its initial decision not to renew petitioner's contract.

The Board cites with approval the ALJ's reliance on Pacio, supra, and his reasons for refusing to relax the 90-day rule in this instance. (Initial Decision, at pp. 6-7) The Board also notes that a mere allegation of age discrimination does not constitute fact, and that, indeed, such a charge makes no sense in view of the structure of teacher employment in New Jersey, where an older employee does not necessarily earn more money and where older employees could actually be preferred to younger because they would work fewer years at maximum salary level before retirement. Finally, the Board notes that the ALJ's application of the 90-day rule does not preclude petitioner from pursuing her allegation of age discrimination in court, so that availability of remedy in another forum also militates against relaxation of the Commissioner's regulation.

Upon careful review of this matter, the Commissioner concurs with the ALJ that petitioner's claim is untimely filed and that relaxation of the 90-day rule is not warranted under the circumstances.

Initially, the Commissioner notes that Pacio, supra, is clearly dispositive of the threshold question herein, in that it stands unequivocally for the proposition that in nonrenewal disputes the 90-day period for appealing to the Commissioner is tolled from receipt of the nonrenewal notice, requests for reconsideration notwithstanding. Petitioner's arguments to the effect that her basis for challenge is not mere disagreement, but charges of fraud and discrimination, do not alter this holding. Rather, they reach to the secondary question of whether relaxation of the rule is warranted in her case.

Essentially, the lateness of the petition had two causes: misconstruing her cause of action to be the Board's decision to affirm her nonrenewal after reconsideration rather than her initial notice of nonrenewal, and then waiting until the last possible moment, erroneously reckoning from the later date, to file a timely appeal. Petitioner asks the Commissioner to focus on the former by arguing her adherence to the spirit of the law, if not its letter, and to bear in mind the serious nature of her allegations.

However, it is clear from the record that the latter consideration was in fact the overruling one, in that petitioner had an attorney on the case and a witness willing to testify well in advance of her actual filing and well within the 90-day time frame even reckoning from the earlier date of her nonrenewal. Indeed, there appears to have been no reason for her to have delayed other than her own personal desire not to disadvantage her former supervisor in his concurrent dealings with the Board, nor does she claim otherwise. Simply put, the decision to delay as long as possible, however well-intentioned on a purely personal level, was a deliberate one made by petitioner herself.

With respect to petitioner's argument that the nature of her petition itself warrants relaxation of procedural rules, the Commissioner notes that he is indeed concerned about allegations of discrimination and has on at least one occasion deemed the

possibility of discrimination sufficient reason to relax the 90-day rule. Frank D'Alessandro, individually and for a class of similarly situated employees v. Board of Education of the Township of Middletown, Monmouth County, decided October 20, 1986. That case, however, arose from the district's adoption of an allegedly flawed affirmative action policy, so that if petitioner's allegations were proven true, a continuing violation would have been created. This consideration overrode the untimeliness of petitioner's individual filing. In this case, by contrast, the alleged violations were individual ones committed against petitioner alone, and were not embodied in any policy or procedure of the district that might result in harm to others if her individual claim were to remain unexamined. Indeed, they were the actions of one man who was not alleged to have discriminated against others in petitioner's circumstances or to have acted at anyone's behest other than his own. In this type of situation, if actions of the sort alleged by petitioner were taken against other staff members, these would be appealable to the Commissioner, who could then address them on their merits and order appropriate remedies as necessary. By the Commissioner's declining to reach the merits in this instance, only petitioner is affected and only to the extent that her deliberate delay in filing has forfeited her right to relief in this forum.

Such being the case, the Commissioner concurs with the ALJ's assessment that the greater public interest in this matter lies with enforcement of the 90-day rule and dismissal of petitioner's appeal as untimely. Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons stated therein and is hereby adopted as the final decision in this matter.*

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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* The Commissioner here wishes to avert any possible confusion that may arise from the Board's interpretation of the ALJ's language regarding the Board's "going beyond" the requirements of law. In its reply exceptions, as noted above, the Board cites as one of the two undisputed facts that led the ALJ to dismiss the petition: "Petitioner was granted an informal hearing before the Board despite the fact that legally the Board 'was not bound to do so.'" (Reply Exceptions, at p. 4). For the record, the Commissioner observes that N.J.A.C. 6:3-1.20 clearly requires the Board to grant, upon the nonrenewed teaching staff member's request, an informal appearance before the Board for the purpose of convincing the Board to offer remployment, such appearance to be nonadversarial in nature although the staff member may be represented by counsel and present witnesses.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY, PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
STEPHEN O'CONNELL, RESPONDENT.	:	DECISION

This matter has come before the Commissioner by way of petition for declaratory judgment filed by the Board of Education of the Township of Holmdel, (Board), on February 28, 1990, seeking a ruling from the Commissioner as to whether Stephen O'Connell, a member of the Holmdel Board of Education, is in conflict with N.J.S.A. 18A:12-2, which speaks to a prohibition against any member of a board of education being "interested directly or indirectly in any contract with or claim against the board***" as a result of his having filed on or about January 31, 1990 a formal Notice of Claim against the Holmdel Township Board of Education seeking punitive and compensatory damages relating to an alleged series of tortious events involving agents and employees of the Board of Education.

On March 22, 1990 respondent filed an Answer and Affirmative Defenses. Thereafter in response to a directive from the Director of the Bureau of Controversies and Disputes on April 9, 1990 both parties filed briefs in support of their respective positions. A summary of said submissions follows.

The Board submits the following Statement of Facts:

> Respondent, Stephen O'Connell, is a member of the Holmdel Township Board of Education (The Board). On January 31, 1990, Mr. O'Connell filed a Notice of Claim against the Board pursuant to N.J.S.A. 59:8-1. (Attached hereto as Exhibit A). Among other things, the Notice of Claim states that the Board and several of its' employees were negligent and committed certain tortuous (sic) acts. The alleged acts include, but are not limited to, an intentional assault upon the person of Stephen O'Connell's son, David, as well as alleged acts which caused mental distress and suffering to David, Stephen, and Eleanor, David's mother.
>
> The Respondent also claims that he and his wife have suffered pecuniary loss due to the alleged action or inaction of the Petitioner and that the Petitioner and its employees committed acts of child abuse upon David O'Connell.

> It is respectfully submitted that the circumstances surrounding Respondent's claim can lead to no other conclusion than one which calls for the Respondent to resign his position from the Board due to the completely antagonistic relationship which now exists between the parties. (Board's Brief, at p. 1)

Citing N.J.S.A. 18A:12-2 and also Board of Education of the City of Newark v. Edgar Brown and Oliver Brown, 1984 S.L.D. 671, 679 the Board contends the statute" should be applied by making an initial determination as to whether the circumstances of the case in question demonstrate that the claim made by the member would result in a substantial and material benefit to him." (Board's Brief, at pp. 2-3) It further cites Van Itallie v. Franklin Lakes, 28 N.J. 258 (1958) wherein the Supreme Court of New Jersey stated:

> The decision as to whether a particular interest is sufficient to disqualify is necessarily a factual one and depends upon the circumstances of the particular case. Aldom v. Borough of Roseland, supra, 42 N.J. Super. at page 503. No definitive test can be devised. The question will always be whether the circumstances could reasonably be interpreted to show that they had the likely capacity to tempt the official to depart from his sworn public duty. (Board's Brief, at p. 3, quoting Van Itallie, at 268)

The Board submits that respondent has placed himself in an adversarial relationship with the Board which will exist at all times, not just when the Board considers the suit brought against it by him.

The Board suggests that this is not a case wherein a Board member is in a conflicting position because he seeks to use his position to benefit himself or a family member through a contract with the Board, a situation the Board contends would create no ill will. Rather, it claims the respondent in this matter filed a Notice of Claim against the Board and its employees, seeking punitive and compensatory damages. "In light of the seriousness and notoriety of the Respondent's claims, it would be impossible for the Petitioner or the Respondent to exercise their public duty in a proper fashion if the Respondent were to remain on the Board. It is submitted that the Respondent's loyalty to the Board and the school system which he serves will be seriously impaired if he remains on the Board." (Board's Brief, at p. 4)

The Board further cites Township Committee of the Township of Hazlet v. Morales, 119 N.J. Super. 29 (Law Div. 1972) in support of its contention that respondent cannot possibly give his exclusive loyalty to the Board because he is suing it. Relying on LaRue v. East Brunswick, 68 N.J. Super. 435, 446 (App. Div. 1961), the Board adds that which the Superior Court of New Jersey considered the duty which a public official owes to the community:

> "...municipal officials are fiduciaries and trustees of the public interest, and that they must demonstrate, not only in fact but also in deed, an exclusive loyalty to the community they serve and a judgment in municipal matters which is unfettered by anything which might redound to their interest as individuals.
> (Board's Brief, at p. 5, quoting LaRue, at 446)

The Board reiterates its contention that it is impossible for respondent to demonstrate an unfettered loyalty to the Board. It further submits that respondent's argument that he will be able to restrain himself is not a basis for denying the relief the Board seeks in its request for declaratory judgment.

The Board also cites S&L Associates, Inc. v. Washington Twp., 61 N.J. Super. 312, 329 (App. Div. 1960) for the proposition that actual proof of the circumstances which create the alleged conflict is not necessary but, rather, can be taken when "...the public official, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes, to the prejudice of those for whom the law authorizes him to act." (Board's Brief, at p. 5, quoting S&L, at 329)

Finally, the Board submits that:

> ***the situation which exists between these parties will not get better unless the Respondent withdraws its claim against the Board. In fact, the circumstances of this case and the publicity surrounding it will probably get much more intense leading to a much more antagonistic relationship between the parties which, if allowed to continue, will only hurt the public.
> (Board's Brief, at p. 6)

For the reasons expressed above, the Board seeks an order directing respondent to resign his position on the Board.

Respondent's Letter Memorandum first sets forth his version of the facts, as follows:

> Respondent, Stephen O'Connell, was initially appointed in 1988 as a member of the Holmdel Township Board of Education, to replace a former member who resigned. In April 1989, Board Member O'Connell was elected by the voters of Holmdel Township as a Member of its Board of Education to a three (3) year term, which expires in 1992.
>
> During the period August 28 through September 1, 1989 an infant son of Board Member O'Connell, as a member of the Holmdel High School Varsity Football Team, attended a Holmdel Board of Education duly sponsored Football Camp at Green

Lane, Pennsylvania. During such camp Respondent's infant son was intentionally assaulted by having his hair cut against his will, intentionally assaulted and humiliated by being forced to participate in a game known as "Twister" while nude and in the presence of others and from which a video tape was produced and exists and otherwise suffered and continues to suffer mental anguish and mental distress from the same.

In early September, 1989, after an investigation of the incidents at the Football Camp were initiated by the Holmdel Board of Education and School Administration, certain members of the Holmdel High School Community, including but not limited to, members of the Varsity Football Team wrongfully and without just cause apparently concluded that Respondent's son was somehow directly or indirectly responsible for the uproar and official investigation. As a consequence, the young man was ostracized by his school peers and members of the Football Team, was physically threatened on numerous occasions with bodily harm and otherwise suffered mental distress from such actions directed at him. Thereafter, on or about September 15, 1989 and for his own health, safety and protection, Respondent's son was forced to withdraw from attendance at the Holmdel High School and to transfer to another school in another community at considerable costs and inconvenience to himself and his immediate family.

Thereafter, on or about January 31, 1990, acting on behalf of his son, himself and his spouse, Respondent through counsel forwarded a certain Notice of Claim to the Holmdel Board of Education and others, under the provisions of N.J.S. 59:8-1, et seq., a copy of which is annexed to the Petitioner's Complaint, giving rise to the instant controversy.

(Respondent's Letter Brief, at pp. 1-2)

Thereafter, respondent submits two points of argument.

POINT I

THE PROVISIONS OF N.J.S. 18A:12-2 ARE INAPPLICABLE TO THE INSTANT CONTROVERSY SO AS TO REQUIRE RESPONDENT TO RESIGN AS A BOARD MEMBER.

Citing N.J.S.A. 18A:12-2, respondent contends that assuming arguendo that the Board interprets the term "claim" in the statute in the context of the notice forwarded by respondent's counsel as disqualifying him from continuing to sit and participate as a

Holmdel Board member, the legislative intent as set forth in the Senate Education Committee Statement, Senate, No. 1007-L. 1981, c.23 was to protect boards from conflicts of interest whereby persons would serve simultaneously as members of governing bodies, teachers within the same school district, municipal employees, and the like. Respondent cites Visotcky v. City Council of Garfield, 113 N.J. Super. 263 (App. Div. 1971) as one such case where the Court interpreted the provisions of N.J.S.A. 18A:12-2 in the context of a person appointed to a board who was employed at the same time within the same district as a teacher. Thus, respondent views the term "claim" set forth in the statute as narrowly relating to a claim or potential claim from conflicting simultaneous offices or office holders, a situation that he avers does not apply to the instant controversy.

POINT II

PETITIONER BOARD OF EDUCATION LACKS AUTHORITY AND HAS FAILED TO STATE A CAUSE OF ACTION SO AS TO REMOVE RESPONDENT AS AN ELECTED MEMBER OF SUCH BOARD OF EDUCATION.

Respondent relies on the provisions of N.J.S.A. 18A:12-3 as defining the narrow conditions under which a board member may be removed from office as follows:

> 18A:12-3. Removal of members
>
> Whenever a member of a local or regional board of education shall cease to be a bona fide resident of the district, or of any constituent district of a consolidated or regional district which he represents, or shall become mayor or a member of the governing body of a municipality, his membership in the board shall immediately cease; and, any member who fails to attend three consecutive meetings of the board without good cause may be removed by it. Whenever a member of a county special service school district or a member of a county vocational school district shall cease to be a bona fide resident of the district, or shall hold office as a member of the governing body of a county, his membership on the board shall immediately cease.***

Respondent contends that in reading N.J.S.A. 18A:12-2 with N.J.S.A. 18A:12-3, it becomes clear that a board member may only be removed when a person moves out of a district, becomes mayor or a member of a governing body, or fails to attend three consecutive meetings without good cause. He suggests that reading the two statutes together reinforces his argument made in Point I suggesting a narrow interpretation of the term "claim" as found in N.J.S.A. 18A:12-2.

Relying on the same Newark v. Brown, supra, case cited by the Board, respondent rebuts the Board's position as follows:

> In the Newark v. Brown Case id., the Commissioner was called upon to review a decision by Administrative Law Judge Stephen Weiss and which held that Edgar Brown and Oliver Brown, elected but not seated members of the Newark Board of Education were not disqualified as Board Members under the provisions of N.J.S. 18A:12-2 for commencing a suit against the Newark Board of Education and for making a claim for legal fees and costs under N.J.S. 18A:12-20.
>
> In affirming the decision of A.L.J. Weiss at 679, the Commissioner noted that every such claim does not automatically disqualify the person making such claim from serving on a Board of Education. The Commissioner further noted that each case must be examined to determine whether the claim is substantial and material and adopted and affirmed the substantial and material test applied by Judge Weiss in his determination.
>
> In addressing the Notice of Claim dated January 31, 1990 forwarded through counsel by Respondent to Petitioner, it should be noted that such claim is essentially a claim by Respondent for or on behalf of his son for damages and injuries suffered by him. Moreover, the direct claims by Respondent and his wife are essentially for reimbursement for tuition expenses, transportation expenses, legal fees and costs and so as to reimburse Respondent for financial obligations and costs which arose out of those actions which gave rise to the claim itself.
>
> Such claims of Respondent therefore cannot be considered "substantial and material" and so as to disqualify him from membership as a fully elected member of the Holmdel Board of Education.
>
> (Respondent's Brief, at p. 5)

For the above reasons, respondent asks that the petition for declaratory judgment be dismissed or, in the alternative, that the Commissioner rule that respondent not be disqualified from membership on the Holmdel Board of Education.

Upon a careful review of the record of this matter, the Commissioner declares that absent respondent's withdrawing his court claims, his seat on the Board must be declared vacant pursuant to N.J.S.A. 18A:12-2 for the reasons which follow.

For clarity of the record the Commissioner would first recite, in toto, the text of the applicable statute:

> No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board, nor, in the case of local and regional school districts, shall he hold office as mayor or as a member of the governing body of a municipality, nor, in the case of county special services school districts and county vocational school districts, shall he hold office as a member of the governing body of a county.

It is well-established that the meaning of a statute first must be sought in the language of the statute. Sheeran v. Nationwide Mut. Ins. Co., Inc., 80 N.J. 548 (1979) If the language of a statute is clear and unambiguous on its face, the Commissioner may not go beyond the words of the statute in order to define the Legislature's intent. State v. Butler, 89 N.J. 220 (1982) In such cases, the language of the statute is the full expression of what the Legislature intended and, although legislative history may be utilized to provide reassuring confirmation of literally apparent meaning, e.g., Gauntt v. City of Bridgeton, 194 N.J. Super. 468 (App. Div. 1984), extrinsic materials may not be used to create ambiguity or to determine that the Legislature intended something other than that which it actually expressed. Safeway Trails, Inc. v. Furman, 41 N.J. 467, (1964), appeal dismissed and cert. denied 379 U.S. 14; Gauntt v. City of Bridgeton, supra The Commissioner finds that the words of the statutes involved here are clear and unambiguous, and that application of the language neither results in conflict nor leads to absurd or anomalous results. Robson v. Rodriguez, 26 N.J. 517 (1958)

On its face, N.J.S.A. 18A:12-2 mandates that no board member may serve who has filed a claim against the board of education on which he sits. Case law has further established that any such claim must be examined on a case-by-case basis in arriving at a determination as to whether the circumstances in the matter demonstrate that the board member would benefit in a substantial and material way from said claim. If so, the statute should be applied and the board member disqualified from serving on said board. See Board of Education of the City of Newark, Essex County v. Edgar Brown and Oliver Brown, supra. See Thomas D. Hogan et al. v. Kearny Board of Education and Kearny Board of Education v. Thomas D. Hogan, decided April 12, 1982, aff'd State Board of Education August 4, 1982. (While a suit for reimbursement of legal fees represents a claim against the board, every such claim does not automatically disqualify the person making such claim from serving on the board of education.) See also In the Matter of the Election of Dorothy Bayless to the Board of Education of Lawrence Township School District, 1974 S.L.D. 595, reversed State Board 603. (Individual circumstances in each case must be examined to determine whether the claim is substantial and material as to require disqualification.)

It is uncontested that respondent's "claim against the Board" in this case seeks damages for mental anguish, mental distress, humiliation and pecuniary loss of an indetermine amount at this time, plus compensatory damages for approximately $25,000 for

tuition and transportation expenses arising out of an alleged series of events occurring from August 28, 1989 to the present. (See Notice of Claim addressed to Dr. Timothy C. Brennan from Eugene F. McEnroe, Esq., dated January 31, 1990, affixed to Brief on Behalf of Petitioner) In this regard, it cannot seriously be argued that such claim is insubstantial. Neither can it be disputed that such claims, if respondent prevails in his tort action against the Board, will result in a material gain to him personally. Accordingly, said interest, by operation of statute, precludes his further service as a member on the Board of Education of the Township of Holmdel.

The State Board of Education, reversing the Commissioner's Decision dated July 24, 1979, has held under a similar fact pattern, that a conflict of interest clearly existed requiring disqualification of a Board Secretary and Business Administrator elected to a seat on the Board of Education in Woodstown-Pilesgrove from serving on said board because he had counterclaimed against the board for compensatory and punitive damages when the board sought to recover funds allegedly paid him improperly. In the matter entitled Woodstown-Pilesgrove Regional Board of Education, Salem County v. John J. Ketas, 1979 S.L.D. 353, rev'd State Board 1980 S.L.D. 1563, the State Board held:

> In our view, a conflict of interest clearly exists, the former employee has disqualified himself from Board membership by filing the counterclaim, and he will not be eligible to serve on the Board as long as the counterclaim is being litigated. We are governed by N.J.S.A. 18A:12-2, which reads as follows:
>
> > "No member of any board of education shall be interested directly or indirectly in any contract with or claim against the board."
> >
> > This section and related statutes incorporate the fundamental common law rule that:
> >
> > "Public servants shall not be interested, directly or indirectly, in any contract made with public agencies of which they are members. Public service demands an exclusive fidelity. The law tolerates no mingling of self-interest." Ames v. Board of Education of Montclair, 97 N.J. Eq. 60, 64 (Ch. 1925).
>
> Lack of conflicting interest is a qualification for board membership. The Appellate Division of the Supervisor Court so ruled in Visotcky v. City Council of Garfield, 113 N.J. Super. 263 (1971), where a teacher in a school system was held ineligible to serve as a member of the board of education employing him. The Court's opinion said:

> "It is noteworthy that L. 1960, c. 93 sec. 1 is listed as a source of N.J.S.A. 18A:12-1 and 2. The 1960 statute combined sections 1 and 2 in one paragraph, thus indicating the several qualifications required. The separation into sections under the same Article indicate an attempt at clarity. We read into N.J.S.A. 18A:12-1 and 2 the need for all the qualifications expressed therein." (at 267)

The rule applies not only to a pecuniary interest, but to a psychological or personal interest as well. As the Court said the Aldom v. Borough of Roseland, 42 N.J. Super. 495, 502 (App. Div. 1956):

> "The interest which disqualifies is not necessarily a direct pecuniary one, nor is the amount of such an interest of paramount importance. It may be indirect; it is such an interest as is covered by the moral rule: no man can serve two masters whose interests conflict. Basically the question is whether the officer, by reason of a personal interest in the matter, is placed in a situation of temptation to serve his own purposes to the prejudice of those for whom the law authorizes him to act as a public official. And in the determination of the issue, too much refinement should not be engaged in by the courts in an effort to uphold the municipal action on the ground that his interest is so little or so indirect."

To the same effect Griggs v. Princeton Borough, 33 N.J. 207 (1960).

The Courts have further declared it to be essential not only that the judgment of the public body be a righteous one, but also that it be rendered "in such a manner as will beget no suspension of the pureness and integrity" of the action. Aldom v. Borough of Roseland, supra; Hochberg v. Borough of Freehold, 40 N.J. Super. 276, 284 (App. Div. 1956).

In the instant case the Respondent is patently interested in a claim against the Board by reason of his counterclaim, which seeks among other things indemnification from financial loss together with compensatory and punitive damages for a complaint sounding in libel.

> We respectfully disagree with the Commissioner's view that the controversy between the parties is so limited that it may be remedied merely by Respondent's abstaining from any discussion of or voting on the matters in dispute. The Respondent is not merely defending his rights under his former employment contract with the Board (which might in itself disqualify him, although we do not now decide that question). He has gone much further here, actively suing the Board for compensatory and punitive damages. Obviously Respondent's conflict with the Board is strong and persistent. In this situation the law requires a person to choose between sitting on the Board and litigating his claims against it. So long as the litigation over the counterclaim continues, the Respondent lacks eligibility to be a member of the petitioning Board.
>
> The counterclaim was not filed until after Respondent's election to the Board. However, even if he were validly elected, his assertion of claims against the public body for compensatory and punitive damages caused him to be removed as a board member for lack of an essential qualification for the office, and his seat became vacant.
>
> The State Board reverses the Commissioner's order, and declares the Respondent's seat vacant. The State Board further direct that the vacancy be filled through appointment by the County Superintendent pursuant to N.J.S.A. 18A:12-15(a). (emphasis supplied)
>
> (Id., at 1563-1564)

In so deciding, the Commissioner rejects respondent's narrow interpretation of N.J.S.A. 18A:12-2. Respondent's reliance on the Senate Education Committee Statement, Senate, No. 1007-L. 1981, c.23, for the proposition that the term "claim" as set forth in the statute relates solely to a claim or potential claim from conflicting simultaneous offices or office holders is misplaced. The legislative statement provided in the amendment to N.J.S.A. 18A:12-2 effective January 11, 1968 explains the rationale for amending the conjunctive clause following the prohibition against board members being interested directly or indirectly with a claim against the board. Contrary to respondent's position, said legislative statement does not limit or even comment on the prohibition against a board member levying a claim against the board on which he or she sits. Rather, it is simply inapplicable to the earlier clause prohibiting members from direct or indirect claims against the board. Accordingly, the Commissioner finds inapposite respondent's reliance on Visotcky, supra, proffered in support of respondent's position in this regard.

Similarly, the Commissioner rejects respondent's second argument, made in reliance upon N.J.S.A. 18A:12-3 being read in pari materia with N.J.S.A. 18A:12-2 averring that a board member can only be removed when a person moves out of a district, shall become a mayor or member of a governing body or fails to attend three consecutive meetings without good cause. To construe the intent of the legislature so narrowly is to ignore the plainfaced language of N.J.S.A. 18A:12-2, which, by its very terms, adds strictures to service as a board member in addition to the fundamental qualifications enumerated in N.J.S.A. 18A:12-1 and N.J.S.A. 18A:12-3. Accord, Ketas, supra.

Finally, in reviewing the case law cited by the Board in support of its position, specifically, S&L Associates, Inc., supra, the Commissioner notes that the statute in question therein pertained to municipal planning board membership. Said statute states, in pertinent part:

> ***No member of the planning board shall be permitted to act on any matter in which he has, either directly or indirectly, any personal or financial interest. (emphasis supplied)
> (N.J.S.A. 40:55-1.4)

While planning board members are not elected officials but, instead, are appointed to serve, the Commissioner notes the narrowly drafted language of N.J.S.A. 40:55-1.4 in comparison to the broad proscriptions embodied in N.J.S.A. 18A:12-2. The former statute clearly intends, by the use of the words "[n]o member of the planning board shall be permitted to act on***" (emphasis supplied), to limit the member's ability to vote on any matter before the planning board in which he holds a direct or indirect financial interest. It does not suggest limiting the member's ability to sit on said board or to otherwise restrict participation on said board except where personal financial interest is present.

By contrast, N.J.S.A. 18A:12-2 clearly seeks, in stating "[n]o member of any board of education shall be interested directly or indirectly in any *** claim against the board***" to preclude any school board member from sitting on the board altogether where a claim against the board exists. Accord, Ketas, supra. In the instant matter, since no doubt exists the such a claim indeed has been lodged by respondent against the Board, the Commissioner must find and direct that respondent shall withdraw such claims against the Board or forthwith forfeit his seat on the Holmdel Township Board of Education.

IT IS SO ORDERED this _____ day of May 1990.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5850-89
AGENCY DKT. NO. 232-7/89

JAMES P. ROGERS,
Petitioner,
v.
BOARD OF EDUCATION OF HIGHLAND PARK, MIDDLESEX COUNTY,
Respondent.

Wayne J. Oppito, Esq., on behalf of petitioner

James L. Plosia, Jr., Esq., on behalf of respondent (Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross, attorneys)

Record Closed: March 22, 1990 Decided: March 27, 1990

BEFORE **SOLOMON A. METZGER,** ALJ:

This matter arises out a petition filed with the Department of Education alleging that respondent has violated petitioner's tenure and/or seniority rights. N.J.S.A. 18A:28-1 et seq. and regulations promulgated thereunder. The matter was transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. The parties have filed cross-motions for summary decision.

The question presented is whether petitioner's status as a tenured supervisor with the title Department Chairperson-Social Studies, gives him a superior right over a non-tenured supervisor in a reduction in force, to a newly created position of Social Studies Supervisor.

The facts are undisputed. Petitioner is a tenured-teaching staff member in respondent's school district. From September 1960 through March 1985 petitioner was a social studies teacher and then was appointed as Department Chairperson-Social Studies. A supervisor's certification is required by respondent for this position, petitioner is so certified, and has attained tenure as a supervisor.

On May 2, 1989, petitioner was notified that the title Department Chairperson-Social Studies was abolished and that he would be reassigned as a social studies teacher. At about the same time, respondent created the position of Cultural and Social Studies Supervisor, which combined the Social Studies Department with foreign language and ESL. Petitioner holds the certification requirements for this position as well. Respondent appointed Joseph Stringer as the Cultural and Social Studies Supervisor. Joseph Stringer is a tenured social studies teacher, but has no tenure as a supervisor. This is the substance of the record.

The parties have agreed that the case presents no genuine fact dispute and is ripe for summary decision. N.J.A.C. 1:1-12.5; Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954).

Petitioner contends that appointment of a non-tenured supervisor to the new position is violative of his tenure rights under Capodilupo v. W. Orange Tp., Ed. Bd., 218 N.J. Super. 510 (App. Div. 1987) and Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239 (App. Div. 1987). Respondent counters that these cases are not applicable because we are here dealing with two tenured social studies teachers and as a result respondent was free to choose among them. Moreover, respondent believes that petitioner had tenure in the title of Social Studies Chairperson which was abolished, and that he has no rights with respect to the new position.

Petitioner's position appears to be consistent with the regulatory framework and decisional law. Respondent would characterize the matter as a choice between two tenured teaching staff members to a new position in which neither had priority. Yet, petitioner is also a tenured supervisor and thus in a reduction in force is entitled to a supervisor's position for which he is certified as against a non-tenured supervisor. Capodilupo/Bednar; see also, Schaeffer v. Bd. of Ed. of So. Orange-Maplewood, (N.J. Comm'n. of Ed. Mar 14, 1988); Herbert v. Bd. of Ed. of Middletown (Comm. Dec. July 25, 1989). While Joseph Stringer may be qualified for the position, he is not free to retain it in the face of petitioner's tenure claim.

Based on the foregoing, it is my conclusion that petitioner is entitled to the position of Cultural and Social Studies Supervisor with its corresponding title of Department Chairperson and it is **ORDERED** that he be so instated with all salary, benefits and emoluments, retroactive to September 1, 1989.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

3/27/90
Date

Howard A. Metzger
SOLOMON A. METZGER, ALJ

Receipt Acknowledged:

Date

~~DEPARTMENT OF EDUCATION~~

~~Mailed to Parties~~:

3/29/90
Date

~~OFFICE OF ADMINISTRATIVE LAW~~
Department of Education

jz

March 30, 1990

Mailed to Parties:
Gabriel G. Hogan
Office of Admin. Law

JAMES P. ROGERS,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF HIGHLAND PARK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4.

The Board's exceptions aver that the ALJ erred when he made the following determination on page 2 of the initial decision:

> Petitioner's position appears to be consistent with the regulatory framework and decision of law. Respondent would characterize the matter as a choice between two tenured teaching staff members to a new position to which neither had a priority. Yet, Petitioner is also a tenured supervisor and thus in a reduction in force entitled to a supervisor's position of which he is certified as against a non-tenured supervisor.

As to the above the Board avers that a supervisor is not automatically entitled under Capodilupo, supra, or Bednar, supra, to any supervisory position held by a nontenured supervisor. The supervisor must have served and achieved tenure under the appropriate certificate in order to make a claim under those two cases. By way of example it avers that:

> ***assuming that Petitioner is this case possessed an English supervisor certificate, he could not make a claim to entitlement to the English supervisory position if that position were currently held by a non-tenured supervisor. Mere certification is insufficient without service and achievement of tenure under that certificate and the Initial Decision is therefore based upon an incorrect statement of the law.
> (Board's Exceptions, at p.3)

The Board also avers that neither Schaeffer, supra, nor Herbert, supra, support the ALJ's analysis in this matter. Of this it contends, inter alia, that:

> Contrary to Judge Metzger's Initial Decision, the law as currently established by Commissioner's

> decisions is that the Capodilupo/Bednar exception applies only when a tenured employee seeks a position held by a non-tenured person. There is no case law to support Judge Metzger's proposition that the exception also applies as between two tenured individuals merely because the incumbent whose job is being sought is not tenured, for example, as a supervisor. To examine the scope of the tenure protection is to engage in a seniority analysis, and it is clear that seniority has no application to this case.
> (Id., at p. 5)

Moreover, the Board argues that assuming arguendo that the Commissioner upholds the initial decision, it should not be responsible for the retroactive salary and benefits ordered by that decision. In support of this the Board argues that it would be grossly inequitable to order such relief as it acted in good faith and consistent with then existing case law. The Board points out that it appointed Joseph Stringer in the spring of 1989 prior to the Commissioner's decisions involving the scope of Capodilupo and Bednar, including Herbert, cited by the ALJ.

Upon review of the record and the Board's exceptions, the Commissioner is in full agreement with the findings and conclusions of the Administrative Law Judge and adopts the initial decision in its entirety. The Board's argument that a nontenured supervisor may be assigned to a supervisory position for which a tenured supervisor is qualified to hold by virtue of his or her certificate because the nontenured supervisor is tenured as a teacher is without merit. Further, the Board's example cited above reflects a misunderstanding of the state of the tenure laws in New Jersey.

Firstly, it must be emphasized that there is no such entity as "an English supervisor certificate." (emphasis supplied) (Id., at p. 3) Unlike the seniority regulations wherein each supervisory position is a separate category, a supervisory certificate is general, i.e., not specific to a subject area.

While the Board is correct in arguing that a supervisor must have served and acquired tenure under such certificate, it is in error when maintaining that a tenured supervisor subject to a reduction in force could not make a claim to a supervisory position related to English if it were held by a nontenured supervisor because the tenured supervisor had not served in the area of English.

In the instant matter, petitioner has acquired tenure as a supervisor and is, therefore, in a reduction in force circumstance entitled to any position held by a nontenured supervisor.

As to the Board's arguments with respect to the issue of back pay and emoluments, the Commissioner finds them without merit as well. Notwithstanding the Board's arguments to the contrary,

petitioner is entitled to such relief since he was improperly denied the contested supervisory position. Capodilupo and Bednar were long since decided by the courts when the Board took its action in 1989. Moreover, it is noted that Schaeffer is virtually identical to the issues in dispute herein and was decided in March 1988 by the Commissioner and affirmed by the State Board in March 1989. Thus, both decisions were prior to the Board's action herein.

Accordingly, the initial decision is adopted as the final decision in this matter for the reasons stated therein.

COMMISSIONER OF EDUCATION

JAMES P. ROGERS,	:	
PETITIONER-RESPONDENT,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF HIGHLAND PARK, MIDDLESEX COUNTY,	:	DECISION
RESPONDENT-APPELLANT.	:	

Decided by the Commissioner of Education, May 10, 1990

For the Petitioner-Respondent, Wayne J. Oppito, Esq.

For the Respondent-Appellant, Sills, Cummis, Zuckerman, Radin, Tischman, Epstein & Gross (James L. Plosia, Jr., Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein. We reiterate that, having achieved tenure in the separately tenurable position of "supervisor," Petitioner was entitled to tenure protection following a reduction in force in any supervisory assignment for which he was qualified by virtue of his certification as against individuals with no tenure as supervisors. See Bednar v. Westwood Bd. of Ed., 221 N.J. Super. 239 (App. Div. 1987), certif. den., 110 N.J. 512 (1988); Capodilupo v. West Orange Bd. of Ed., 218 N.J.Super. 510 (App. Div. 1987), certif. den., 109 N.J. 514 (1987); Herbert v. Board of Education of the Township of Middletown, decided by the State Board of Education, August 1, 1990.

September 5, 1990

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

DECISION AND ORDERS ON CROSS-MOTIONS FOR SUMMARY DECISION
OAL DKT. NO. EDU 4833-89
AGENCY DKT. NO. 204-6/89

BARKER BUS CO., INC.,
Petitioner,
v.
MILLBURN TOWNSHIP BOARD OF EDUCATION AND MELNI BUS SERVICE, INC.,
Respondent.

Hayward F. Day, Jr., Esq., for petitioner

Steven B. Hoskins, Esq., for respondent, Millburn Township Board of Education (McCarter & English, attorneys)

Patricia B. Santelle, Esq., for respondent, Melni Bus Service, Inc. (Pitney, Hardin, Kipp & Szuch, attorneys)

BEFORE **JOHN R. TASSINI,** ALJ:

STATEMENT OF THE CASE

Petitioner, Barker Bus Co., Inc. ("Barker") and respondent Melni Bus Service, Inc. ("Melni") submitted bids for a contract to provide transportation for children in the

school system operated by the respondent Millburn Township Board of Education ("Board"). Barker's bid was lower; however, it did not comply with the Board's specifications. The Board rejected both bids and advertised for new bids on the contract. See, N.J.S.A. 18A:18A-1 et seq. Barker contends that (1) its original bid's lack of compliance should have been waived as minor, inconsequential and therefore curable; (2) it should have been afforded an opportunity to amend and cure any defects in the bid; and (3) the Board should have awarded the contract to it.

Barker moves for summary decision in its favor and the Board has filed a cross motion for an order dismissing Barker's petition with prejudice, submitting that the lack of compliance relates to material non-waivable bid conditions and that Barker's bid was properly rejected. See, N.J.S.A. 18A:18A-22.

PROCEDURAL HISTORY

On June 30, 1989, Barker's verified petition was filed with the Commissioner of the Department of Education ("Commissioner"). See, N.J.S.A. 18A:8-10. The Commissioner transmitted the matter to the Office of Administrative Law ("OAL") where on July 3, 1989, it was filed as a contested case. N.J.S.A. 52:14B-1 et seq., N.J.S.A. 52:14F-1 et seq. and N.J.A.C. 1:1-3.1.

On July 7, 1989, the parties argued Barker's motion for emergent relief (contained in its verified petition), i.e., an order temporarily restraining the Board from proceeding with the rebidding. See N.J.A.C. 1:1-12.6. On that day, I entered an order denying the motion and providing for discovery and a plenary hearing. On July 21, 1989, the Board's answer and defenses were filed with the Commissioner and they were later transmitted to the OAL.

The matter was scheduled for hearing beginning on January 8, 1990, but was adjourned at Barker's request to allow for cross motions for summary judgment. On January 22, 1990, I received a stipulation of dismissal of Barker's claims against Melni, executed by Barker's and Melni's attorneys. On March 7, 1990, Barker's motion papers were filed and on March 21, 1990, the Board's motion papers were filed.

FINDINGS OF FACT

Given the facts not in dispute, as set out in the July 7, 1989 order and the exhibits indicated, I **FIND** the following Facts:

On June 8, 1989, the Board advertised for bids for its public school transportation contract for the 1989-1990 school year.

The Board's bid specifications required, among other things that (1) the bid be submitted on an annual basis, (2) the bid contain a list for "Identification of Vehicles Proposed for Use", (3) the bidder's representative's signature on the bid bond be witnessed or acknowledged and (4) the bidder's surety's signature on the bid bond be witnessed or acknowledged. See, BOE-1.

Barker did not question or challenge any of the Board's specifications prior to submitting its bid.

On June 20, 1989, Barker and Melni made timely submissions of their bids and were the only bidders.

On June 20, 1989, the Board opened and reviewed the bids: Melni's bid was $250,712, and it complied with the Board's bid specifications. See, M-1. Barkers bid was $239,547; however, it failed to comply with the Board's specifications as follows: (1) Barker's bid was made on a per diem basis, (2) Barker submitted no list identifying the vehicles to be used, (3) Barker's representative's signature was neither witnessed nor acknowledged, and (4) Barker's surety's signature on the bid bond was not witnessed or acknowledged. See, B-2.

After the opening of the bids, the Board's assistant superintendent (1) attempted to calculate Barker's bid on an annual basis based on the per diem information in its bid, (2) telephoned Barker and had a "general discussion about the vehicles Barker intended to use in servicing the contract" and (3) telephoned a representative of Barker's surety and was assured that, despite the absence of the witnessed signature or acknowledgement, the surety bid bond was valid. See, B-3 and BOE-2.

Given the assurance by Barker's surety, the Board waived Barker's failure to comply with the requirement that the surety's signature be witnessed or acknowledged.

The Board refused to waive the following deficiencies: (1) Barker's failure to submit a bid on an annual basis and (2) Barker's failure to submit a list identifying the vehicles to be used in the school transportation contract for the 1989-1990 school year.

Melni objected to the form of Barker's bid because of the above failure to comply with the bid specifications. On June 26, 1989, the Board, acting in good faith, voted to reject both bids and rebid the contract on July 10, 1989.

Presumedly, the result of the rebidding was not agreeable to Barker; however, the moving papers have not made this clear.

LEGAL DISCUSSION AND CONCLUSIONS

Barker has moved for summary decision, contending that (1) its noncompliance with the specifications was minor and inconsequential and therefore (2) the Board was obliged to waive same and award it the contract. The Board has cross moved, submitting (1) it has an "unconditional right" to reject any nonconforming bid and (2) Barker's noncompliance was material and could not be waived.

Motions to dismiss or for summary decision are an efficient means of disposing of litigation, available when there are no genuine issues of material fact. However, such a motion must be carefully considered, particularly when the public interest is involved. The burden of proof is upon the movant and all reasonable inferences must be drawn in favor of the opponent of the motion, whose papers must be indulgently treated. See N.J.A.C. 1:1-12.5, R. 4:46-2, and Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954).

The Public Schools Contracts Law ("Law") governs the process of contracting with a board of education "for the performance of work or the furnishing or hiring of services, materials or supplies" (with the exception of contracts of employment). See N.J.S.A. 18A:18A-1 et seq., See particularly, N.J.S.A. 18A:18A-2(c) and N.J.S.A. 18A:18A-3.

The Law provides for a bidding process in which notice of contract "specifications" is to be given by publication. Specifications ensure that all bidders bid on the same thing and the public knows what a bidder must give and the board must receive. The Law does not permit a bidder to supplement his bid in essential details, i.e, where the bid is lacking or uncertain in material or "essential information" it is invalid. See, Belousofsky v. Board of Education of City of Linden, 54 N.J. Super. 219 (App. Div. 1959). That is to say, minor or inconsequential conditions may be sensibly or practically resolved; however, material conditions in bidding specifications may not be waived. Terminal Const. Corp. v. Atlantic Cty Sewerage Auth., 67 N.J. 403, 411 (1975).

Given the above, if (1) the submission of a bid on an annual basis and (2) the submission of a list identifying the vehicles to be used were material conditions, then they could not be waived and Barker's bid was properly rejected.

Conditions requiring a detailed description of materials or proof of present ability to perform have been found to be so material that they should not to be the subject of waiver. Id. at 411-412. The condition that a school bus transportation contract bid be described on a destination and length of run basis has been found to be material and not satisfied by a bid made on a charter basis. Rolfe v. Board of Ed., Ramapo Indian Hills, OAL DKT. EDU 3960-80, (Aug. 21, 1980), adopted, N.J. Comm. of Ed. (Oct. 8, 1980.)

Here the Board's specifications clearly required a bidder to submit bids "on a per annum basis." This is a reasonable request and a bidder should not reasonably expect the Board to transpose his per diem figures into a per annum bid. Such calculations are an invitation to mistakes and/or confusion.

The Board's specifications also clearly required a bidder's identification of vehicles (or replacement of like or fewer years of age). This is also a reasonable way to ensure safe and reliable transportation of school children and compliance with Department of Education regulations relating to age of vehicles, equipment, inspections, etc. See, e.g., N.J.A.C. 6:21-1.4, N.J.A.C. 6:21-5.1 et seq., N.J.A.C. 6:21-13.2(h) and N.J.A.C. 6:21-18.1.

Given the above, I **FIND** and **CONCLUDE** that Barker's noncompliance was material and not waivable. That is, the Board's specifications should not to be reduced to the status of a "polite request." Pucillo v. Mayor and Council of borough of New Milford, 73 N.J. 349, 356 (1977).

The Legislature has recognized the significance of a bidder's failure to meet bidding specifications and the Board's rights in such circumstances:

> No bid shall be accepted which does not conform to the specifications furnished therefor. Nothing contained in this chapter shall be construed as depriving any board of education of the right to reject all bids. N.J.S.A. 18A:18A-22.

Given the material defects in Barker's bid and the Board's unquestioned good faith in rejection of the bids, I **FIND** and **CONCLUDE** that Barker's bid was properly rejected. Cardell, Inc. v. Tp. of Woodbridge, 115 N.J. Super. 442, 450-451 (App. Div. 1971), certif. den., 60 N.J. 236 (1973).

ORDERS

I **DENY** Barker's motion for summary decision.

I **GRANT** the Board's motion for summary decision.

I **ORDER** Barker's petition **DISMISSED** with prejudice.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

3/29/90
DATE

John R Tassini
JOHN R. TASSINI, ALJ

Receipt Acknowledged:

3/30/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 2 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

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BARKER BUS CO., INC.,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF MILLBURN, ESSEX COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed, as have exceptions by petitioner and replies thereto by respondent, both timely filed pursuant to N.J.A.C. 1:1-18.4.

In its exceptions, petitioner (hereinafter "Barker") reiterates its position that respondent (hereinafter "the Board") had not only the right, but the duty, to waive the two irregularities that resulted in rejection of its bid. Barker avers, contrary to the holding of the ALJ, that these irregularities were minor and inconsequential, and that they had no bearing on the bid differential such that the other bidder would have been prejudiced by the waiver or that the spirit of the Public Schools Contracts Law would have been violated. Further, because the public would have benefited by Barker's considerably lower bid, the Board actually failed in its duty under the Law by refusing to waive Barker's defects.

With respect to having submitted its bid on a per diem rather than an annual basis, Barker contends that there was no possibility of confusion or inconsistency in that there were only two bidders and the calculation necessary to convert its bid to an annual basis was a simple one performed "on the spot" at the opening of bids; and that by this very act, together with the fact that the bid was not immediately rejected upon discovery of the error, the Board waived its right to rely on this irregularity as a basis for rejection. With respect to failing to submit a list of vehicles, Barker contends that it "had not yet decided whether to utilize presently owned vehicles to service the Millburn contract or to purchase new ones for that purpose [so that it] purposely did not provide a list of vehicles, and [that it] intended to discuss with the Board, after the bid, the specific type and age of vehicle [to be used]." Moreover, it could have provided such a list "within a matter of minutes at the bid opening if [it] had been given the opportunity to do so, or if there was any indication at all that an objection was to be filed." (Exceptions, at pp. 2-3)

In reply, the Board argues that no case law supports Barker's contention that where only two bids are submitted and one is defective, the Board should allow the defective bid to be cured

at the moment of bid opening; to the contrary, case law holds that regardless of the number of bidders, the Board cannot be expected to perform the calculations that a responsible bidder should have performed. Rolfe, supra Further, Barker's contention that its per diem bid could not possibly result in confusion is belied by Barker's own questions about the number of days used to multiply its per diem rates. (Brief in Support of Petitioner's Motion for Summary Decision, at pp. 8-10) With respect to the missing list of vehicles, Barker's exceptions make a factual argument not raised before the ALJ and unsupported by affidavit, so that the Commissioner should not entertain it. Ultimately, the Board argues, it has the statutory right to reject any and all nonconforming bids (N.J.S.A. 18A:18A-22, 18A:39-5), and Barker has not shown that the Board acted improperly by doing so in this instance.

Upon careful review of this matter, the Commissioner concurs with the ALJ that the defects of Barker's bid were material and that the Board's determination to reject both Barker's and Melni's bids and proceed to rebid was appropriate under the circumstances.

It may be true that the defects in Barker's bid were susceptible to easy remedy in purely practical terms, in one case by translating a per diem bid into a per annum by using an agreed-upon multiplier, in the other by producing a list of vehicles proposed for use. However, the ease with which a bidder might have hypothetically been able to address the deficiencies of his bid does not alter their nature with respect to materiality under the Public Schools Contracts Law. In this case, the bid actually submitted in response to the Board's published specifications failed to address the requirements established therein as the common basis for bidding, not merely with respect to technical form and minor detail, but in the cornerstone matters of vehicles to be used and the basis for administration of the contract. The Board was under no obligation to permit these defects to be cured, nor did Assistant Superintendent Brennan's informal per annum calculation constitute any such cure or waiver of the Board's right to object to defects. To the extent that the Board might have entertained a waiver in its discretion, it must be observed that Melni cited Barker's defects in correspondence dated the very day after bids were opened (Exhibit BOE-3), so that the Board had ample reason to believe that, had it permitted cure and accepted Barker's bid on that basis, it might be deemed to have prejudiced Melni, who had complied precisely with the stated specifications, and would very likely have been subjected to challenge. Instead, by rejecting both bids and proceeding to a prompt rebid, the Board gave Barker an opportunity to cure its defects and re-compete with Melni on a clear common basis, while protecting the public through its refusal to accept the higher Melni bid outright solely because the Barker bid was defective, and through its avoidance of protracted legal proceedings and unnecessary delays in arranging for services. Under the circumstances, the Board's decision was both proper and appropriate,

and the record provides no basis on which the Commissioner could disagree with the ALJ's assessment that the Board at all times acted in good faith.*

Accordingly, the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal is affirmed for the reasons stated therein as amplified by the Commissioner's comments above.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

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* The Commissioner here notes that Barker's arguments to the effect that the Board's specifications were unreasonable or inconvenient to the bidder are inappropriate in this context, as they amount to an after-the-fact challenge to the specifications themselves by a party who bid under them without complaint.

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6538-89
AGENCY DKT. NO. 260-8/89

REBECCA BARUFFI, ANTHONY LEHNER and MARIT GAYNOR,

Petitioners,

v.

MORRIS HILLS REGIONAL HIGH SCHOOL BOARD OF EDUCATION,

Respondent.

Stephen B. Hunter, Esq., for petitioners
(Klausner, Hunter & Oxfeld, attorneys)

Monica Olszewski, Esq., for respondent
(Greenwood, Young, Tarshis, Dimiero & Sayovitz, attorneys)

Record Closed: March 13, 1989 Decided: March 29, 1989

BEFORE **WARD R. YOUNG, ALJ:**

Tenured teaching staff members Anthony Lehner and Marit Gaynor alleged their tenure rights were violated upon a reduction in force when the Board acted to assign then non-tenured Peter Lazzaro to a position as "In School Suspension/Remedial Teacher" (ISS) and rejected their applications for same. (Rebecca Baruffi withdrew as a petitioner).

The Board avers it acted properly in the exercise of its discretionary authority to limit qualifications for the position of ISS to those applicants who possess instructional certification endorsements in English, Social Studies, Mathematics, Science, Business, and Special Education.

The matter was transmitted to the Office of Administrative Law as a contested case on August 30, 1989 pursuant to N.J.S.A. 52:14F-1 et seq., was preheard on November 1, 1989, and proceeded to plenary hearing on February 5 and 6, 1990. Post-hearing briefs were submitted and the record closed on March 13, 1990.

The following **FINDINGS OF FACT** are adopted as the result of stipulations, admissions in pleadings, and a review of testimonial and documentary evidence:

1. Petitioner Anthony Lehner is a tenured teaching staff member, employed by respondent since September 1984, and possesses instructional certificates issued by the New Jersey State Board of Examiners with endorsements in Industrial Arts and Technical Occupations (Electronic Technology). See, P-1, P-2.

2. Lehner was noticed of a reduction in force under date of April 25, 1989 and was terminated as of June 30, 1989. See, P-3.

3. Lehner applied for the 1989-90 position of In School Suspension/Remedial Teacher, but was noticed of his rejection under date of June 6, 1989 for not possessing a certification endorsement deemed by the Board to be a requirement. See, P-13.

4. Petitioner Marit Gaynor is a tenured teaching staff member, employed by respondent since April 6, 1975, and possesses instructional certificates issued by the New Jersey State Board of Examiners with endorsements in Health Education, Physical Education and Driver Education. See, P-4, P-5.

5. Gaynor was noticed of a reduction in force under date of April 25, 1989 and was terminated as of June 30, 1989. See, P-6.

6. Gaynor applied for the 1989-90 position of In School Suspension/Remedial Teacher, but was noticed of her rejection under date of June 6, 1989 for not possessing a certification endorsement deemed by the Board to be a requirement. See, P-11.

7. On or about May 24, 1989, two vacancies for In School Suspension/Remedial Teacher were posted for the 1989-1990 school year, which incorporated the following qualifications: Possess a New Jersey State Standard Teaching Certificate in either of the following subject areas: English, Social Studies, Mathematics, Science, Business, Special Education. See, P-7.

8. Elmer R. Losey, Jr., a tenured teacher of English first employed by respondent in September 1972, applied for a transfer to the position of In School Suspension/Remedial Teacher for the 1989-90 school year.

9. Peter Lazzaro was first employed by respondent for the 1986-1987 school year as a certified teacher of Business/Data Processing, and continued in the assignment of micro-computer programming through the 1988-1989 school year. His position was abolished for the 1989-1990 school year and he applied for the position of In School Suspension/Remedial Teacher for the 1989-1990 school year.

10. Losey and Lazzaro were appointed by respondent to 1989-1990 positions as In School Suspension/Remedial Teachers at its June 26, 1989 Board meeting. See, R-12.

11. Lazzaro did not acquire tenure until his first day of employment in September 1989.

12. Respondent's agent, Randel Kanter, Director of Educational and Administrative Services, was advised by Norman J. Provost, Educational Specialist, representing the Morris County Superintendent of Schools, that the position of In School Suspension/Remedial Teacher is a recognized title which only requires an instructional certificate. See, P-9.

RELEVANT TESTIMONIAL EVIDENCE

The Superintendent of Schools, Dr. James J. McNasby, testified that the administrative staff raised concerns about needed improvement in the In School Suspension (ISS) program. Previous to 1989-90, various teachers were assigned to the program for one period a day. A lack of continuity was detected which resulted in the creation of two full-time positions.

McNasby stated that pupils are assigned to the program for three days as the result of rules violations. Regular teachers of pupils assigned provide assignments to ISS teachers who then monitor and assist to ensure completion of them. He testified that Morris County Superintendent Snow advised him that only an instructional certificate was required.

High school principal George N. Smith testified that he and another high school principal interviewed the five or six applicants who possessed the required endorsement. He stated that teachers with remedial/basic skills experience and/or training were sought, and that the interview team determined that Losey and Lazzaro were deemed to be the best applicants, notwithstanding they had no basic skills experience.

Successful applicant Lazzaro, who was appointed by the Board to the 1989-90 position as In School Suspension/Remedial Teacher prior to his acquisition of tenure, testified that his highest priority in the ISS program is the pupil's completion of teacher assignments. He stated that he had experienced no difficulty working

with pupils in the areas of English, Social Studies, and Mathematics, notwithstanding that he does not possess any endorsements in these areas.

The respondent's District Director of Instructional Services, Kathleen Fuchs, testified that any certified teacher could teach in the ISS program, but she does not consider Health and Physical Education and Technology courses to be academic.

Industrial Arts teacher Donald A. Slezak testified that Technology is considered an academic area, and that although ten of fifty pupils have participated in the ISS program, there has been but one communication between the ISS teacher and himself, which was initiated by him when a pupil's work product had not been returned to him.

RELEVANT DOCUMENTARY EVIDENCE

A document entitled Educational Plan and Proposed Budget incorporates a mission statement as follows:

> The In School Suspension Program is designed to both punish and remediate students who have purposely violated school rules and regulations. The program offers the students the opportunity to continue academic study while excluded from their regular program. In addition, the program should provide the opportunity for the student to bring about positive changes in behavior. (See, R-1).

Superintendent McNasby incorporated recommendations concerning the ISS program in a memo to the Board under date of May 19, 1989 which included the following: "Teaching classes will concentrate on basic computation, communication and reading skills." See, R-4.

Elena J. Scambio, Essex County Superintendent, transmitted a memo to Northern County Superintendents under date of February 5, 1988 which addressed certification requirements "to teach basic skills remedial classes in the area of communication

(Reading/Writing)." An attached chart to the memo indicates required certification of Elementary, Reading, English, English/Reading, and Mathematics for the concentration areas indicated in the McNasby memo for secondary level remedial programs. See, R-5 attachment.

The philosophy of the ISS program is embodied in a curriculum document which states: "The major goal of the ISS/Remedial Program is to decrease the number of students who are repeated offenders." It includes five units and incorporates instructional objectives, materials, and subject matter content. See, R-7.

A procedure and data document indicates "The purpose of the ISS/Remedial Program is to allow the student to continue his or her academic work while on suspension." See, R-9.

Extensive testing and Suspension Learning Packets were admitted into evidence, presumably to demonstrate the professional skills needed by the teacher to implement the ISS program. See, R-11.

DISCUSSION

The extensive recitation of testimonial and documentary evidence was incorporated herein to establish a foundation for addressing the issues.

The petitioners in this dispute were excluded as applicants because they lacked the certification endorsements required for consideration. It is not known if the endorsement qualifications were determined administratively or by Board resolution as the record is void of any Board action other than the appointments of Losey and Lazzaro.

The ISS program is characterized as remedial. The administrative interview team selected the successful applicants and sought teachers with basic skills training and/or experience, but the Board employed one teacher with an English endorsement, and another with an endorsement in Business/Data Processing.

It is not the function of the undersigned to address the genesis of the ISS program or assess it. It is no secret that pupils who violate school rules create administrative disciplinary problems, and that out of school suspensions also have created school-home and school-community relations problems in many districts. The ISS program is deemed herein to be the prerogative of the local district as a means to address these problems. The issue herein is whether discretion is abused in the implementation of this program which allegedly has violated the tenure and/or seniority rights of petitioners through the restrictive endorsement qualification.

ARGUMENTS OF COUNSEL

Petitioners initially rely on Dowding v. Monroe Township Board of Education, 1989 S.L.D. _____ (decided March 7, 1989) for the proposition that the position of in-school suspension teacher is an instructional assignment in a recognized title which does not require approval of the County Superintendent, and which may be filled with any teacher holding an instructional certificate regardless of the endorsements. The Commissioner also stated that seniority accrues "within the area of his instructional endorsement."

Petitioners also rely on N.J.A.C. 6:11-5.1 and 6:11-7.3 for the proposition that teacher preparation and certification standards for the instructional certificate are distinguishable only by subject matter requirements for specific endorsements.

The thrust of petitioners' arguments is the alleged circumvention of N.J.S.A. 18A:28-12 and violation of their tenure rights by the exclusivity of the endorsement qualifications. They cite Capodilupo v. West Orange Tp. Bd. of Ed., 218 N.J. Super. 510 (1987) and Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239 (1987) for the proposition that untenured personnel cannot be retained as against a qualified tenured teacher.

Petitioners also cite Burke v. Board of Education of the Borough of Union Beach, 1988 S.L.D. _____ (decided June 29, 1988) for the proposition that qualifications established by a Board which are beyond those of certification may not serve to thwart an individual's tenure and seniority rights.

The Board counters with reference to Van Os v. Bd. of Educ. of the Twp. of Cinnaminson, 77 S.L.D. 1040 and Tirico v. Little Ferry Bd. of Educ., 1984 S.L.D. ___ (decided January 19, 1984) in support of its belief it is empowered to establish qualifications beyond the requirements of the statutory or regulatory schemes if deemed to be reasonable and do not contravene either scheme.

FURTHER DISCUSSION, FINDINGS, AND CONCLUSIONS

The authority of the Board to require specific endorsements which excluded petitioners from consideration for the positions at issue and circumvented their tenure rights is the gravaman of this dispute.

Nothwithstanding the McNasby and Smith testimony and documentary evidence that indicate a desired concentration on basic computation, communication and basic skills objectives, Peter Lazzaro testified his priority is to get pupils to complete the assignments of their regular teachers. These assignments are, in most cases, in subject areas in which neither Losey or Lazzaro possess endorsements.

The Appellate Division in Bednar, citing Lichtman v. Ridgewood Bd. of Ed., 93 N.J. 362 (1983) and Capodilupo, stated at 242 that competing rights for non-tenured teachers are not created or authorized by statute. The court in that matter also said at 243.

> N.J.S.A. 18A:28-10 declares only the rights inter sese of tenured teachers in a RIF. Among them, seniority is determinative. But, the statute does not authorize regulatory dilution of tenure rights by affording a non-tenured teacher "seniority".

I **FIND** the endorsement qualifications excluding petitioners from eligibility for consideration for the positions of In School Suspension/Remedial Teacher to be unreasonable and which circumvent their tenure rights, whether by design or happenstance. They must therefore be set aside.

I **FURTHER FIND** the seniority rankings of the teaching staff members involved in this dispute, with the greatest first, to be Losey, Gaynor, and Lehner. These findings result in the **CONCLUSION** that teaching staff member Losey is entitled to retain his position as teacher in the ISS program, and that petitioner Gaynor is entitled to the position currently held by Peter Lazzaro.

IT IS THEREFORE ORDERED that Marit Gaynor be reemployed as a replacement for Peter Lazzaro as a teacher in the ISS program, and is to be made whole by the compensation of lost salary due to the violation of her tenure right. Said compensation shall be mitigated by any earnings realized during the period from September 1, 1989 to her reinstatement for days and during hours she would have been gainfully employed by respondent if her tenure right had not been violated.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with Saul Cooperman for consideration.

29 March 1990
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

4/3/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 2 1990
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

g

REBECCA BARUFFI, ANTHONY LEHNER AND MARIT GAYNOR,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE MORRIS HILLS REGIONAL SCHOOL DISTRICT, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and petitioners' reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4 and are summarized below.

The Board's exceptions indicate that it believes the ALJ failed to recognize and address the full ambit of the "In-School Suspension/Remedial Teacher" position at issue. The Board avers, inter alia, that the decision is fatally flawed because it fails to include consideration of the job description and testimony related to the position which had as a component the remediation of basic skills deficiencies.

More specifically, the Board argues that the central issue in the matter is whether it had the authority to create the new position and to require the endorsements it did. As to this, it contends that the omission of consideration of the job description and testimony indicates no weight was accorded to the designated goals and responsibilities of the ISS/Remedial position, i.e. discipline and remediation. The Board reiterates its arguments that once remediation was introduced to the ISS program it was appropriate for it to frame the job description and certification/endorsement requirements it deemed to be related to basic skills remediation. Among other things it argues that:

> The administrative law judge concluded that "endorsement qualifications excluding petitioners from eligibility for consideration" were unreasonable and circumvented their tenure rights, "whether by design or happenstance." This conclusion was reached without consideration of the ISS/remedial program's parameters and the Board's authority to design a program different from the ordinary ISS program which is essentially "baby-sitting" at worst and is "status-quo-focused" at best.
>
> The evidence demonstrated that, here, the Board determined to infuse affirmative remediation of the basic skills to a student population that was deemed "at-risk". Testimony was provided by

> Superintendent McNasby and Kathleen Fuchs, Director of Instructional Services, that the Board considered research, its own and third party, that children with academic difficulties are most likely to be discipline problems. Thus, remediation of basic skills is inherently linked to reduction of discipline recidivism. This concept formed the basis of the District's revamping of the prior unsuccessful ISS program. The Initial Decision fails to refer to this uncontroverted evidence.
>
> Without analysis of critical facts, the administrative law judge stated: "It is not the function of the undersigned to address the genesis of the ISS program or assess it." He continued: "The issue herein is whether discretion is abused in the implementation of this program...." The refusal to assess the ISS/remedial program is plain error since, without such assessment, it cannot be determined whether the Board's discretion has been appropriately utilized in requiring certain endorsements. This is the only relevant inquiry and the Initial Decision, admittedly, has limited its consideration so as to exclude certain key facts from its determination.
>
> (Board's Exceptions, at p. 4)

In addition to the above, the Board avers that the initial decision is unclear as to the legal basis for its conclusion that petitioners' tenure rights have been violated. It maintains that Capodilupo, supra, is not apposite to the matter since the petitioners were not qualified for the positions. It also reiterates its arguments that the duties performed by a teacher rather than the name given a position controls the determination of tenure rights.

Petitioners' reply to the Board's exceptions avers that it is significant that the Board has provided no reference to the hearing transcripts to support its assertion that the disputed positions herein provide for regular basic skills instruction and remediation of basic skills deficiencies. As to this, they maintain that no evidence to that effect was in fact presented. More specifically, petitioners avow that:

> ***The fact that the Board of Education would prefer that the District's in-school suspension program establish an affirmative basic skills remediation component is not dispositive in the instant matter when, as concluded by the Administrative Law Judge, the testimony of the instructional personnel who presently hold the in-school suspension program positions at issue established that the priority of the program in

its present form is to assist pupils to complete the classroom assignments assigned to the students by their regular classroom teachers. The assignments were, in most cases, in subject areas in which neither incumbent possessed the required endorsement to render any effective academic assistance to the students in the completion of their classroom assignments.

The present ISS incumbents, Peter Lazzaro and Elmer Losey, testified that the students' academic teachers were required to assign a sufficient amount of work for each student involved in the in-school suspension program for at least a three day block of time. Mr. Lazzaro and Mr. Losey would work with the students, upon their request, to attempt to answer questions the students had with regard to completing assignments that were assigned by the students classroom academic teachers. Any instruction initiated by Mr. Losey and Mr. Lazzaro during the present 1989-90 school year was limited to self image modification training, life skills, and a review of learning packets that included among other exercises units with regard to "lateness in school," "insubordination," "dishonesty," and "truancy".

It was evident throughout the two days of hearings in the instant matter that any individual with an instructional certificate was fully capable of handling the ISS assignment at issue during the 1989-90 school year. The limited duration; i.e. normally three days, of students assigned to the ISS program was hardly conducive to any form of traditional academic instruction. (emphasis in text)

(Reply Exceptions, at p. 2)

Upon review of the record, the Commissioner adopts the conclusion of the ALJ that the endorsement qualifications excluding petitioners from consideration for the positions of In-School Suspension/Remedial Teacher circumvented their tenure rights. Careful review of the record and exceptions indicates that the disputed position at issue herein was essentially one of in-school suspension and only peripherally one of remediation. Under no circumstance is the position purported to be a preventive or remedial program as set forth in N.J.A.C. 6:8-6.1. Further, the record demonstrates that the program is primarily for students assigned to the program due to disciplinary infractions for up to three days at a time and that regular teachers of such pupils provided assignments to the ISS teachers who monitored and assisted them in completion of the assignments. While affirmative remediation may be a goal of the program, a review of the job

description and regard to the fact that any specialized endorsement upon an instructional certificate is required for the position.

The Board correctly argues that it is permitted to establish additional qualifications beyond the threshold qualifications, however, it fails to understand that such additional requirements cannot defeat tenure or seniority rights conferred by statute. See South River Education Association et al. v. Board of Education of South River, Middlesex County, decided by the Commissioner September 9, 1985, reversed State Board November 4, 1987, aff'd N.J. Superior Court Appellate Division, April 16, 1990.

Thus, the Administrative Law Judge ruled correctly when he determined that the Board was prohibited from setting qualifications excluding petitioners from consideration as they were tenured teaching staff members subject to a reduction in force who were qualified for the disputed positions.

The Commissioner does not accept the ALJ's conclusion, however, that Mr. Losey was entitled to one of the ISS/Remedial positions as he was the most senior of the teaching staff members in the matter. Nowhere in the record is it demonstrated that he was subject to a reduction in force, thus his tenure and seniority are not at issue in the dispute. Rather, the record demonstrates that he requested a voluntary transfer to an ISS/Remedial position which the Board granted.

Petitioners were subject to abolishment of their positions in April 1989. Therefore, when the vacancies for ISS/Remedial teaching positions became open in May 1989, petitioners should by virtue of their tenure rights have been assigned to them as they were qualified for the positions. A voluntary transfer of a tenured teacher not subject to a reduction in force may not abrogate petitioners' entitlement to the vacant positions. As recently reiterated by the Court in South River, supra.

> Tenure, as created by statute, should be liberally construed to further its beneficial purpose of affording job security to teachers who meet its designated time of service. Spiewak v. Rutherford Bd. of Ed., 90 N.J. 63, 74 (1982). The paramountcy of tenure is recognized by the eligibility-seniority list for reduction in force dismissed teachers. The State Board's approach recognized that paramountcy and precludes erosion of the legislatively created tenure rights. See Bednar v. Westwood Bd. of Educ., 221 N.J. Super. 239, 243 (App. Div. 1987), certif. den. 110 N.J. 512 (1988). (Slip Opinion, at p. 4))

Further, in Balczun v. Board of Education of the Borough of Medford Lakes, Burlington County, decided by the Commissioner July 16, 1987, a voluntary transfer of a tenured teacher from a teacher of the handicapped position to an elementary teacher

position after the teacher's abolished teacher of the handicapped position was recreated was set aside because to rule otherwise would have eroded the tenure and seniority rights of Petitioner Balczun who had also been subject to a RIF and was on a preferred eligibility list for an elementary teacher position.

Accordingly, the recommended decision of the ALJ is modified to order the reinstatement of both Petitioner Gaynor and Petitioner Lehner to the ISS/Remedial positions together with all backpay, emoluments, and benefits less mitigation of any monies earned during this period of wrongful termination.

Notwithstanding the outcome of this decision, the Commissioner commends the Board and staff for developing and implementing an ISS program that appears to be well-conceived and well executed.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SUMMARY DECISION
OAL DKT. NO. EDU 6697-89
AGENCY DKT. NO. 264-8/89

ROGER STURGES,
Petitioner,
v.
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK,
Respondent.

Mark J. Blunda, Esq., for petitioner

J. Peter Sokol, Esq., for respondent (McOmber & McOmber, attorneys)

Record Closed: March 8, 1990 Decided: April 4, 1990

BEFORE **BRUCE R. CAMPBELL, ALJ:**

Roger Sturges, petitioner, seeks an order declaring that the Asbury Park Board of Education, respondent, (a) has violated N.J.S.A. 18A:30-2.1, (b) requiring the Board to pay him pursuant to the statute retroactive to the date of an alleged injury and (c) awarding him attorney's fees and costs of suit.

The matter was opened before the Commissioner of Education and transmitted to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14B-1 et

seq. and N.J.S.A. 52:14F-1 et seq. Prehearing conferences were held on January 4 and 16, 1990. Among other things, it was determined that the issues to be resolved are whether the petitioner suffered a work-related injury as contemplated in N.J.S.A. 18A:30-2.1 and, if so, to what relief the petitioner is entitled, both as to compensation and to attorney's fees and costs of suit.

The Board moved for summary judgment and the petitioner timely filed responsive papers.

For purposes of the motion, the following facts are stipulated:

1. The petitioner was employed by the Asbury Park Board of Education as a school custodian at all relevant times.

2. During the 1988-89 school year, the petitioner suffered personal injuries as a result of accidents arising out of and in the course of his employment.

3. The petitioner's injuries were reported to the Board's workers' compensation insurance carrier and to the hospitalization and major medical insurance carrier.

4. The workers' compensation carrier denied coverage for the petitioner's injuries because they were not reported in a timely manner.

5. The hospitalization and major medical carrier denied coverage for the petitioner's injuries on the grounds that they should be covered by workers' compensation insurance.

6. By letter dated April 26, 1989, the petitioner by his counsel demanded that the Board pay him full salary pursuant to N.J.S.A. 18A:30-2.1, as a result of the on-the-job injury.

7. The Board refused the request for payment pursuant to N.J.S.A. 18A:30-2.1.

8. The petitioner consulted an attorney specializing in workers' compensation law and was advised that a compensation petition could not be timely filed because of what is known as the 48 hour hernia rule.[1]

BOARD'S ARGUMENT

A Division of Workers' Compensation decision is binding on the Commissioner of Education in determining any entitlements under N.J.S.A. 18A:30-2.1. The Appellate Division has held:

> [A]s the express function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits for a strictly limited time period, a proceeding pursuant to that statute may not be utilized to supplant the function of the compensation court. By its terms, this statute contemplates a prior determination of a compensable injury by the compensation court before consideration by the commissioner of the eligibility of the injured employee for the additional benefits provided by the statute.

Forgash v. Lower Camden County School, 208 N.J. Super. 461, 466-467 (App. Div. 1985).

This decision has been followed by the commissioner and the State Board of Education. Amos v. Red Bank Bd. of Ed., OAL DKT. EDU 3757-86 (Jan. 14, 1987), mod. Comm'r of Ed. (Mar. 17, 1987), aff'd St. Bd. (Feb. 3, 1988). In Amos at 7, the commissioner agreed with the initial decision's analysis where it dealt with Forgash:

> The Appellate Division made it clear that certain procedures must be followed before N.J.S.A. 18A:30-2.1 may be invoked:
>
> 1. A proceeding pursuant to N.J.S.A. 18A:30-2.1 cannot be used to circumvent the compensation statutes.
>
> 2. N.J.S.A. 18A:30-2.1 requires "a prior determination of a compensable injury by the compensation court" before it can be invoked.
>
> 3. The only function of N.J.S.A. 18A:30-2.1 is to complement workers' compensation benefits and [it] cannot be considered independently.

1. N.J.S.A. 34:15-12(c)23 provides notice of traumatic hernia must be given by the claimant within 48 hours of the occurrence. No such notice was given herein.

The petitioner alleges he suffered a work-related injury but concedes in his petition that the Board's workers' compensation carrier denied coverage because the injury was not timely reported and stipulates herein that competent counsel advised him he could not timely file a workers' compensation claim. Petition, par. 6; stipulation 8, above. The Board argues that this means the commissioner is without a basis to decide any entitlement in this case under N.J.S.A. 18A:30-2.1.

The petitioner failed to affirmatively and timely take action in connection with a workers' compensation claim. He seeks equity, but apparently has not done that which was required in order to receive equity.

PETITIONER'S ARGUMENTS

The petitioner asserts the Board's summary motion must be denied because there has been no final determination as to the compensability of his injury and the workers' compensation forum is not available to him. Therefore, the petitioner is entitled to pursue the matter before the commissioner.

The petitioner acknowledges that the commissioner has made clear his position on the procedure to be followed in cases involving N.J.S.A. 18A:30-2.1. Relying on the Appellate Division decision in Forgash, above, the commissioner has directed that

> Until such time as a prior determination is made by Workers' Compensation with respect to petitioner's claim to an occupational illness, the Commissioner cannot and will not render a determination on N.J.S.A. 18A:30-2.1 as dictated by Forgash, supra, irrespective of and notwithstanding what the Board may have done in the past with two other teachers who contracted childhood illnesses.
>
> In other words, petitioner must first, in accordance with Forgash, pursue her occupational illness claim under the provisions of N.J.S.A. 34:15-1 et seq. before the Commissioner may determine her N.J.S.A. 18A:30-2.1 claim. Once her eligibility has been determined through the workers' compensation statutes, he could then render a determination on any controversy that may exist over the education statute which is intended to complement those for workers' compensation.

Amos, at 17.

While acknowledging that the function and expertise of the Division of Workers' Compensation qualify it as the appropriate forum of primary jurisdiction in matters of this type, the petitioner urges that his case is different. The usual procedure now is that petitions of appeal under N.J.S.A. 18A:30-2.1 are placed on the inactive list pending a final determination of disability claims by the Division. This case, however, involves an injury suffered by a school custodian that subsequently was diagnosed as a hernia. As stipulated, the petitioner applied to the Board's carrier for benefits and was denied because of the 48 hour rule. The petitioner consulted an attorney specializing in compensation matters and was advised he could not timely file a claim consistent with N.J.S.A. 34:15-12(c)23, the 48 hour rule.

Because there has been no final determination by any competent tribunal, and there will not be any determination by the Division, there is no danger of conflicting agency determinations and no danger of encroaching upon the primary jurisdiction or expertise of the Division.

It could not have been the intent of the courts or the commissioner to deny the opportunity to pursue sick leave in cases such as this. The courts and the commissioner have been concerned with the application of these complementary statutes in an orderly and uniform fashion. In Forgash, above, the court stated it was allowing a new determination in a second forum in order to assure compensation for the petitioner's injuries. The same rationale operates here. If the petitioner is not allowed to pursue his sick leave claim before the commissioner, he will be denied any compensation for an on-the-job injury. Neither the courts nor the commissioner can have intended such an unjust result.

DETERMINATION

As Forgash and subsequent cases make clear, a petitioner must first pursue an injury claim in the Division of Workers' Compensation. Only after an eligibility determination has been made by the Division does N.J.S.A. 18A:30-2.1 come into play. In this matter, there was no Division determination, nor can there be by operation of N.J.S.A. 34:15-12(c)23. Does that mean the petitioner is without recourse? The short answer is yes.

Workers' compensation legislation is remedial legislation. As such, it is to be interpreted liberally. The American system of workers' compensation, true to its European roots, is designed to accommodate a large class of cases. In return for generally smaller recoveries than might be had in tort actions, injured workers are offered a simpler, faster and generally more sure arrangement. Adopted schedules control the amounts of awards. Rules, less formal than those of the judicial courts, control the process and contribute to its relative swiftness.

One of the rules encountered is the 48 hour hernia rule, which states:

> Where there is a traumatic hernia compensation will be allowed if notice thereof is given by the claimant to the employer within 48 hours after the occurrence of the hernia but any Sunday, Saturday or holiday shall be excluded from this 48-hour period.

This rule is a rule of repose and of limitation. Whenever a line is drawn by a statute or a rule, there will be those who find themselves just beyond the reach and who feel themselves ill treated. "But every line drawn by a legislature leaves some out that might well have been included. That exercise of discretion, however, is a legislative, not a judicial, function." Village of Belle Terre v. Boraas, 416 U.S. 1, 8 (1974).

For whatever reason, the petitioner could not or did not timely file a workers' compensation claim. An application to the Board's compensation carrier was rejected because the injury was not reported in a timely manner. The petitioner now would use N.J.S.A. 18A:30-2.1 to secure benefits not available through the regular workers' compensation process.

I **FIND** that, as the commissioner stated in Amos, above, the petitioner must pursue a workers' compensation claim before the commissioner may determine a N.J.S.A. 18A:30-2.1 claim. If there has been no workers' compensation claim, there can be no commissioner's determination.

In Riely v. Hunterdon Central High Bd. of Ed., 173 N.J. Super. 109 (App. Div. 1980), a nontenured teacher pursued a contractual grievance procedure including arbitration when her contract was not renewed. Slightly more than a year later, the arbitrator found against the teacher. Fifty days later, the teacher filed a petition of appeal with the Commissioner of Education. The board of education moved to dismiss. The commissioner denied, holding that the petition had been filed within 90 days of the

arbitrator's award.[2] On appeal, the State Board of Education also denied. The Appellate Division reversed, holding the petition of appeal was filed out of time and should have been dismissed because there was no reason to withhold the appeal to the commissioner during the pendency of her arbitration proceedings.

The instruction is clear. Rules of limitation may not be relaxed absent exigent circumstances. Unless the petitioner was prevented by unlawful means from complying with the 48 hour rule, his failure to comply with it is fatal to this appeal.

Accordingly, I **CONCLUDE** that the Board's motion for summary judgment must be **GRANTED** as a matter of law. Judson v. Peoples Bank & Trust Co. of Westfield, 17 N.J. 67 (1954).

Summary judgment in favor of the respondent, the petition of appeal dismissed. It is so **ORDERED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

2. N.J.A.C. 6:24-1.2(b) requires a petition be filed not more than 90 days from the date of the board of education action complained of. Riely also discussed adoption of the rule, not pertinent to today's decision.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

4 APRIL 1990
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, ALJ

Receipt Acknowledged:

DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

April 9, 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

km

ROGER STURGES,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF ASBURY PARK, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

The Commissioner adopts the findings and conclusions of the ALJ for the reasons well stated in the initial decision.

Accordingly, the Petition of Appeal is dismissed.

COMMISSIONER OF EDUCATION

MAY 16, 1990

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW
185 WASHINGTON ST
NEWARK, NEW JERSEY 07102
(201) 648-6186

INITIAL DECISION
OAL DKT. NOS. EDU 3535-89 and
EDU 5069-89 (consolidated)
AGENCY REF. NOS. 106-4/89 and
191-6/89

MARILYN CUTLER,
RAYMOND GOIN,
ANITA SWOTINSKY,
Petitioners,
v.
BOARD OF EDUCATION,
TOWNSHIP OF PARSIPPANY-TROY HILLS
MORRIS COUNTY,
Respondent.
and
JAMES R. BATES,
Petitioner,
v.
BOARD OF EDUCATION,
TOWNSHIP OF PARSIPPANY-TROY HILLS,
MORRIS COUNTY,
Respondent.

Louis P. Bucceri, Esq., for petitioners
(Bucceri & Pincus, attorneys)

Henry N. Luther III, Esq., for respondent,
(Dillon, Bitar & Luther, attorneys)

Record Closed: February 23, Decided: 4/2/90

BEFORE **EDITH KLINGER,** ALJ:

On April 13, 1989, petitioners Marilyn Cutler, Raymond Goin, and Anita Swotinsky filed a verified petition with the Commissioner of Education alleging that the respondent Board violated petitioners' respective tenure and seniority rights under N.J.S.A. 18A:28-5 and/or N.J.A.C. 6:3-1.10 et seq. when it refused to allow them to rescind their notices of intent to retire after they had been approved by the Board. The Board filed its answer to petitioners' verified petition on May 8, 1989 and on May 12, 1989, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

On June 19, 1989, petitioner James R. Bates filed a verified petition with the Commissioner of Education alleging the same violation of his rights by the Board as that alleged by petitioners Cutler, Goin, and Swotinsky. The Board filed an answer to his verified complaint on July 11, 1989 and on July 13, 1989, the Department of Education, Bureau of Controversies and Disputes, transmitted this matter to the Office of Administrative Law as a contested case pursuant to N.J.S.A. 52:14F-1 et seq.

After notice to all parties, a prehearing conference was scheduled for August 16, 1989, when it was determined that the two matters should be consolidated.

It was also determined that the following issues were to be resolved at hearing:

1. Does the Board's refusal to rescind its approval of petitioners' conditional retirement dates violate their tenure and/or seniority rights under N.J.S.A. 18A:28-5 and/or N.J.A.C. 6:3-1.10 et seq.?
2. Was the Board's approval of the conditional retirement dates an ultra vires act?
3. Do the Board's acts violate the public policy underlying the pension laws of New Jersey? Fair Lawn Ed. Assn. v. Fair Lawn Bd. of Education, 79 N.J. 574 (1979)?

4. Does the Commissioner of Education have jurisdiction over the subject matter of this appeal? (Anne Hall v. BOE of the Twp. of Jefferson, Morris Cty., OAL DKT. EDU 2392-88 (Sept. 9, 1988), rev'd. Com'r of Ed. (Oct. 20, 1988), rev'd, State Bd. of Ed. (May 5, 1989)).

The hearing was held on January 8, 1990, but the record was held open in order to allow the parties to submit briefs. The record closed on February 28, 1990, when the last submissions were received.

STIPULATION OF FACTS

At the direction of the Administrative Law Judge, a Stipulation of Facts was submitted by the parties at the time of hearing. The facts set forth below were stipulated and I **FIND** them to be uncontested:

1. The respondent Board has a practice and policy embodied in the Teachers' Collective Bargaining Agreement providing retiring employees with salary payments in lieu of accumulated sick leave (called terminal leave pay). This provision in relevant part provides:

> 6. Terminal Leave Pay Upon Retirement
> A. Any teacher having been employed by the Board of Education for fifteen (15) or more years shall be eligible for terminal leave pay provided the teacher submits written certification of retirement to the Superintendent of Schools on the appropriate forms as attached Appendix I prior to January 1 of the school year next preceding the school year in which retirement is to be effective.
>
> B. Approval of such retirement shall be made by the Board of Education at its regular public meeting next following January 1 and shall be binding upon the teacher with the Board of Education save harmless to continue employment beyond the designated effective date of retirement. (Nothing in this provision shall prohibit the Board of Education from approving an earlier effective date of retirement upon request of the teacher providing it is in the

school year next following the school year in which certification of intent to retire is made as designated in "A" above.) In the event of extenuating circumstances such as illness, personal or family welfare, not including a desire to retire early, a teacher may apply for this benefit in the teacher's last year of work and such benefit shall be paid in accordance with this provision.

. . .

2. Each of the petitioners is or was a tenured teaching staff member in respondent's district.

3. Petitioners Cutler, Swotinsky and Goin were not offered employment by respondent for the 1989-90 school year.

4. Petitioner Bates will not be offered employment by respondent for the 1990-91 school year.

5. Respondent will employ and has employed individuals for 1989-90 and 1990-91 who are either less senior than each petitioner in their respective categories of seniority or who are not tenured in those areas in which petitioners are certified to teach and in which petitioners have held tenure.

6. Petitioners Cutler, Swotinsky and Goin were eligible for terminal leave pay and were paid the following amounts:

Cutler:	$ 8,422.70
Goin:	9,298.85
Swotinsky	4,809.38

There is no dispute as to the correctness of the amounts paid.

7. Petitioner Bates was not eligible for terminal leave pay and will not receive same if his service terminates as of June 30, 1990.

8. During the last ten (10) years only two (2) individuals other than petitioners have requested rescission of their notice of intent to retire. They are:

Charles Motola
Mal Sumka

Both individuals were permitted to rescind.

REVIEW OF THE EVIDENCE

The testimony of the witnesses was uncontroverted and therefore I **FIND** the following to be uncontested **FACT:**

Petitioner Marilyn Cutler testified that she was first employed by the school district in September 1958 as an elementary school teacher. During the 1988-89 school year, she received a salary of $43,200 plus $1,500 as longevity pay. Her salary was at the top of the salary guide. On December 21, 1987, she told Arthur P. Mildner, Director of Employee Relations for the district, that her husband planned to retire in June 1989 and she might wish to retire at the same time. She made it clear to Mildner that she wanted to take advantage of the provision in the teacher's collective bargaining agreement for terminal leave pay upon retirement. Cutler testified that she was familiar with the provision. Since she wished to retire on June 30, 1989, the appropriate forms had to be submitted to the superintendent of schools of the district prior to January 1, 1988.

The substance of this conversation was confirmed by a letter from Cutler to Mildner written on the same day. The letter leaves open the possibility that she might want to rescind her notice of retirement should circumstances change.

The Board, in accord with Provision 6B of the collective bargaining agreement, approved Cutler's retirement on January 14, 1988, at its first regular meeting following January 1, 1988. A letter notifying Cutler of the approval of her retirement was sent to her by Ruth Krawitz, Superintendent of Schools, on January 19, 1988. No mention was made of any conditions attached to this approval.

In 1989, Cutler's husband sold the family business and retired. He then bought an interest in another business but he became ill and could not continue to work.

In November 1989, Cutler spoke to Jerry Sullivan, who had replaced Mildner as Director of Employee Relations for the district. Mildner had passed away sometime in

late 1987 or early 1988. She told Sullivan that there were personal considerations which might force her to request a delay of her retirement date from June 30, 1989 to June 1990. According to Cutler, Sullivan instructed her to advise him of her decision at the earliest possible time, before he started to hire a replacement for her. By December 15, 1988, she informed him that she would not retire in June 1989.

She confirmed this in a letter to Sullivan dated January 2, 1989, in which she stated that she had not filed any papers with Trenton concerning her retirement and would therefore appreciate his setting into motion the procedure for rescinding her resignation, scheduled to go into effect in June 1989.

Sullivan responded that her letter of January 2, 1989 provided insufficient reasons for the Board to consider rescinding their acceptance of her resignation, and he requested a fuller explanation.

On January 4, 1989, Cutler wrote a second letter to Sullivan explaining that her husband had developed some medical problems which caused them to experience financial reversals: He was unable to work several days a week as he had planned because of his illness. "My request to rescind my resignation of June 1989 would allow us to firm up a financial base and make retirement a better reality. I would therefore retire in June 1990."

On January 13, 1989, Cutler received a letter from Frank A. Calabria, President of the Board, stating that the Board had carefully considered her request to rescind her previously approved retirement date as outlined in her letter of January 4, 1989, but had denied her request. Her retirement date of June 30, 1989 remained as approved by the Board on January 14, 1988.

Cutler asked to address the Board herself to see if she could persuade it to change its decision, but the Board refused to hear her. Ruth Krawitz, Superintendent of Schools for the district, said that she would speak for Cutler at the Board meeting.

On January 14, 1989, Cutler wrote to Calabria alleging that the Board was refusing to honor the commitment made to her by Mildner; t . . . she could withdraw her letter of resignation if her circumstances changed. She believed that her letter of resignation, dated December 21, 1987, contained a provision, placed there on the advice of Mildner, making her resignation conditional and, if the Board did not consider it a conditional resignation, she should have been advised at the time so that she could have withdrawn her request. The letter also states that Mildner told her that there were numerous examples of rescissions being accepted by the Board in the past.

Cutler never signed a written certification of retirement form to be submitted to the Superintendent of Schools, as required by paragraph 6A of the teachers' collective bargaining agreement, to initiate the retirement process. She also said that she indicated to Sullivan in a conversation which took place in December of 1988 that she was probably not going to retire in June of 1989.

On cross-examination, Cutler admitted that she knew that when the Board accepted her resignation on January 14, 1988, it had not seen her letter of December 21, 1987 to Art Mildner stating that her request for retirement was conditional; she thought that the Board understood in some manner that she had discussed this possibility with Mildner.

Raymond Goin has been employed by the respondent district since December 1, 1969 as an elementary school teacher. In the 1988-89 school year, he received an annual salary of $46,700 plus $500 longevity pay. He was at the top of the salary guide.

Goin wished to take advantage of the terminal leave pay upon retirement provision of the collective bargaining agreement and discussed the matter with Mildner in September 1987.

Goin wanted to retire at the end of the 1988-89 school year, unless his health was still good at that time. He was aware that he had to give the Board at least 18 months' notice to take advantage of the terminal leave pay provision but wanted the option to rescind his request to retire if his health permitted him to continue teaching. A letter

from Goin to Mildner dated September 21, 1987 states, "I understand district regulations require 18 months' notice prior to retirement in order to be eligible for sick leave payment." It continues, "I will probably retire in June 1989.... But, if my health is still good at that time, I would like to continue through June of 1990."

Goin believed that 18 months was a long time for the Board to require advance notice of retirement. He asked Joseph Monahan, the principal of his school, why this was necessary and Monahan explained that the purpose of the notice period was to allow the district to acquire the money to make the payments.

Goin testified that he submitted his Notice of Intent to Retire to the Board because he wanted to protect his terminal leave pay. From hearsay, he believed that the Board would allow him to rescind the notice and he also knew Mildner to be an honorable person who could be expected to live up to his agreements.

The Board, at its regular meeting of November 10, 1987, approved Goin's retirement unconditionally, effective June 30, 1989. A letter notifying Goin of its approval was sent to him on November 17, 1987.

On November 22, 1988, Goin wrote to Ruth Krawitz, stating that his health was still good and he would therefore like to retire in June 1990, instead of June 1989. Goin explained at the hearing that he could receive higher Social Security benefits and another year of free hospitalization if he remained in the district's employ for an additional year before retiring.

On November 29, 1988, Goin received a letter from Robert Perlett, Assistant Superintendent of the district, informing him that the Office of the Superintendent would recommend to the Board that his approved retirement date of June 30, 1989 remain in effect.

On December 12, 1988, Goin addressed a request to remain until June 1990 to Calabria. On January 6, 1989, Calabria responded that his request would be discussed by the Board in the near future; but he was to consider his retirement date of June 30, 1989

as firm unless he received written notification otherwise. On January 13, 1989, Calabria wrote to Goin to say that the Board had considered his request to rescind but it was denied.

Goin was aware that a member of the teaching staff may retire from the district at any time by giving 60 days' notice. According to Goin, he gave the 18-months' notice required by the terminal leave pay provision of the collective bargaining agreement because he wanted to be fair to the district by giving it maximum notice and also because he wanted to protect his terminal leave benefits.

Although Goin had read the terminal leave pay provision of the agreement, he said that he did not understand the meaning of the words of paragraph 6B of the agreement, that approval of a teacher's retirement by the Board would be binding upon the teacher "with the Board of Education save harmless to continue employment beyond the designated effective date of retirement."

He did not submit a written certification of retirement to the Superintendent of Schools on the forms required by paragraph 6A of the collective bargaining agreement.

Anita Swotinsky was first employed by the district on September 1, 1969 as a secondary teacher of mathematics. Her salary is also at the top of the salary guide. During the 1988-89 school year, she received $43,200 and $500 in longevity pay.

Swotinsky's husband planned to retire in 1989. In November 1987, Swotinsky considered her retirement and decided to give the Board enough notice so that they could hire someone to replace her, and she could retire with her husband and be able to take advantage of the terminal leave pay provision of the collective bargaining agreement.

On November 25, 1987, Swotinsky wrote a letter to the Board stating her intent to retire in June 1989. She concluded, "If my personal circumstances change in the next 18

months. and I decide to postpone retirement. I would sincerely appreciate it if you would allow me to continue."

Swotinsky had read carefully the terminal leave pay provision and knew that she had to submit a written certification of retirement in order to initiate the benefits of the clause. She called the Board and they mailed her a certification of retirement form.

Swotinsky was aware of the "save harmless" provision in paragraph 6B of the agreement and expressed her concern to Mildner, whom she met at a meeting. He told her that the phrase was just a formality so that the Board could let a teacher leave who had given the district bad service. but she had nothing to worry about because she was such a good teacher. He told her not to put the condition upon her request in writing because it was not necessary. When she wavered and expressed the thought that she should forget about the extra retirement pay and wait to submit a letter of intent to retire until 60 days before her intended retirement date, Mildner convinced her to send her letter of intent to the Board right away.

According to Swotinsky, she believed that Mildner was making representations within the scope of his authority and could commit the Board to honor the agreement he had made with her. On November 30. 1987, she submitted her signed certification of retirement to the Board. based upon her conversation with Mildner.

At its regular meeting of December 10. 1987, the Board approved Swotinsky's June 30. 1989 retirement. She was notified of the approval by letter from Ruth Krawitz on December 17, 1987.

In December 1988. Swotinsky decided not to retire in June 1989. She sent a letter to the Board on December 7, 1988 stating that she would like to rescind her certification of retirement so that she could continue teaching until June 1991.

The Board, through Sullivan, asked her what reasons she had for rescinding her Notice of Retirement. She explained that she wished to give two more years of service to

the district. When Sullivan asked her what financial reasons she had for seeking rescission, she said that there were none. On January 2, 1989, Swotinsky wrote a letter to Sullivan setting forth in detail why she thought that the Board should accept her rescission. None of these reasons spoke of any hardship that would be created for her if the Board refused. Swotinsky became 60 years in old in March of 1989 and the additional two years would allow her to retire after her 62d birthday, when her Social Security benefits would be higher.

There was additional communication between Swotinsky and the Board. The Board agreed to reconsider her request to rescind. However, on January 31, 1989, it notified her that it would not alter its decision not to allow her to rescind her request to retire on June 30, 1989.

On cross-examination, Swotinsky testified that one of the reasons she believed she would be able to change the date of her retirement was that, in 1981, she had a prior experience with Mildner and the Board in which she was allowed to alter a plan that had been previously approved by the Board. When she was unable to carry out the plan approved by the Board for her sabbatical leave, she spoke to Mildner and it was arranged that she could substitute an alternative program. The Board approved the change of program.

James R. Bates was first employed in the district in September 1978 as a teacher of industrial arts. He is also at the top step of the salary guide. According to Bates, in August or early September of 1988, he considered retiring. He testified that his home had burned down and he planned to rebuild it. He believed at the time that it would be ready for occupancy in the spring or summer of 1990 and that he would be able to complete the construction with his retirement pension.

On September 28, 1988, he sent a letter to the Board stating that he planned to retire on approximately April 1, 1990 and that under the terms of the collective bargaining agreement, he was giving them the 18 months' notice necessary for him to be reimbursed

for the sick days which he would have accumulated. The Superintendent's Bulletin of October 27, 1988 stated that James R. Bates submitted his letter of intent to retire on April 1, 1990 and that the Superintendent recommended that the Board approve the retirement of Bates with payment of terminal leave pay.

On November 15, 1988, Krawitz wrote a letter to Bates informing him that, on October 27, 1988, at its regular meeting, the Board had approved his retirement on April 1, 1990.

On March 30, 1989, Bates wrote to Krawitz requesting rescission of his retirement date of April 1, 1990 giving "unforeseen happenings personally within family matters" as the reason. On April 4, 1989, Krawitz requested that Bates clarify specifically what his reasons were.

Bates responded in a letter, dated April 10, 1989, telling Krawitz that his home in Montvale had been destroyed by fire and needed to be rebuilt and that if he retired, his pension statement would not show sufficient income for the bank to give him a mortgage. In fact, after 30 years of teaching, he has no pension since he borrowed heavily from the pension fund and would not finish buying back 20 years of pension time credit until 1998 if he continued to teach.

Bates admitted that he did not read the "terminal leave pay upon retirement provision" of the collective bargaining agreement and was not aware of it until the present litigation began. He did not discuss the matter with anyone in the district before submitting a letter of intent to retire. Under the collective bargaining agreement clause, Bates does not even qualify for terminal leave pay since he has not been employed for 15 years by the district. Bates believed the Superintendent's Bulletin of October 27, 1988 indicated that the Board had approved his receipt of terminal leave pay although it was merely the recommendation of the Superintendent.

Bates never signed a written certification of retirement. He never discussed the possibility of rescinding his letter of intent to retire with anyone; he thought he could

change his mind because of conversations that he had with other members of the faculty to the effect that the "Board did not lock teachers in" in matters of resignation.

On April 12. 1989, the Board of Education notified Bates that it denied his request to rescind his retirement date of April 1. 1990 but agreed to change the date from April 1. 1990 to June 30. 1990. an extension of three months.

On June 8. 1989. the Board again refused to approve Bates' request for rescission. The Board did not consider the reasons which Bates gave to constitute sufficiently extenuating circumstances to warrant the rescission. In a letter of July 24. 1989, Jean Vasile, Director of Personnel and Employee Relations, notified Bates of the Board's decision and told him to make a request in writing if he wished the Board to extend his retirement date from April 1, 1990 to June 30, 1990.

On July 26, 1989, Bates requested that the date be changed to June 30, 1990 and his request was approved by the Board at its regular meeting on August 24. 1989.

All of the petitioners are represented by the Parsippany-Troy Hills Education Association, the collective bargaining unit for the teachers.

ADDITIONAL FINDINGS OF FACT

The testimony of all the petitioners is clear and I **FIND** that all of them intended to resign at the time they submitted their notices to the Board. I further **FIND** that they all intended to give the Board 18 months' notice so that they would be able to take advantage of paragraph 6 of the teachers' collective bargaining agreement which would allow them to collect terminal leave pay upon their retirement provided that the required notices were given. I **FIND** that all of the teachers attempted to retire on a conditional basis so that they could preserve their right to receive terminal leave pay but also to allow themselves the option to retreat in case circumstances made retirement on the

projected day inexpedient. I **FIND** that Swotinsky, Cutler, and Goin all waited approximately one year from the date upon which the Board approved their retirement date until the date they attempted to rescind their request for retirement; Bates attempted to rescind approximately three and one-half months after his notice was accepted by the Board.

I **FIND** that, from the date when the Board accepted the petitioners' notices of their intent to retire, the Board had to find replacements for the four teachers and accumulate over $22,500 in terminal leave pay for Cutler, Goin, and Swotinsky.

I **FIND** that all of the petitioners had received copies of the teachers' collective bargaining agreement and at least Swotinsky. Cutler. and Goin were familiar with the "terminal leave pay upon retirement" provision.

DISCUSSION OF LAW AND CONCLUSIONS

It was initially urged by petitioners that matters in this case were within the jurisdiction of the Public Employees' Relations Commission (PERC) and that the matter could not proceed without the participation of PERC at some level. It was found by the Administrative Law Judge (ALJ) that the issues raised could be disposed of under the sole jurisdiction of the Commissioner of Education and the case proceeded on this basis.

Petitioners argued, relying upon Anne Hall v. BOE, Twp. of Jefferson, Morris Cty., that the Commissioner of Education had no jurisdiction over the subject matter of this appeal.

Under N.J.S.A. 34:13A-5.3, public employees, including teachers, have the right to be represented by an employee organization in negotiations with the school district by which they are employed. The statute provides in relevant part:

"

> Representatives designated or selected by public employees for the purposes of collective negotiation by the majority of the employees in a unit appropriate for such purposes or by the majority of the employees voting in an election conducted by the commission as authorized by this act shall be the exclusive representatives for collective negotiation concerning the terms and conditions of employment of the employees in such unit.

Under N.J.S.A. 34:13A-5.1(a), the Division of Public Employment Relations is concerned exclusively with "matters of public employment related to. . .settlement of public employee representative and public employer disputes and grievance procedures."

The present matter was raised not as a dispute or grievance procedure between the school board and the petitioners, but rather as a violation by the school board of petitioners' tenure and seniority rights under Title 18A of the New Jersey Statutes.

In N.J.S.A. 34:13A-8.1, the following language appears:

> Nothing in this act shall be construed to annul or modify, or to preclude the continuation of any agreement during its current term heretofore entered into between any public employer and any employee organization, nor shall any provision hereof annul or modify any pension statute or statutes of this State. [Emphasis added]

In Board of Education, Twp. of Rockaway v. Rockaway Twp. Education Ass., 120 N.J. Super. 564 (Chan. Div. 1972), the court stated that:

> It cannot be argued, therefore, that Title 18A, "Education," insofar as it is concerned with relationship between boards, teachers and pupils, has been superseded. Even were this language eliminated from chapter 303, our Supreme Court has held that the general rule of statutory construction, in the absence of clear legislative direction to the contrary, requires a determination that a later statute will not be deemed to repeal or modify an earlier one, but all existing statutes pertaining to the same subject matter "are to be construed together as a unitary and harmonious whole, in order that each may be fully effective." Clifton v. Passaic County Board of Taxation, 28 N.J. 411, 421 (1958). Thus, the provisions of

> both Title 18A and chapter 303 must be read together so that both are harmonized and each is given its appropriate role. Twp. of Rockaway, at 569.

No argument can be made that the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq. was ever intended to supersede N.J.S.A. 18A:28-5. Matters concerning the tenure rights and seniority rights of teachers are placed clearly within the jurisdiction of the Department of Education by the Legislature in Title 18A and the statutory scheme is not modified by the Employer-Employee Relations Act.

I, therefore, **CONCLUDE** that the subject matter of this dispute is within the jurisdiction of the Commissioner of Education under Title 18A of the New Jersey Statutes and may be heard by the undersigned, to whom it was referred, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq., without reference to the Employer-Employee Relations Act, N.J.S.A. 34:13A-1 et seq.

Petitioners next raised a question as to whether the acts of the Board violate the public policy underlying the pension law of New Jersey as set forth in Fair Lawn Education Assn v. Fair Lawn BOE, 79 N.J. 574 (1979). The issue raised in Fair Lawn was whether local boards were delegated the authority to make payments to employees and related services rendered for the sole purpose of inducing early retirement. The facts in this matter do not support the application of Fair Lawn to this case. The terminal leave payment provision of the teachers' collective bargaining agreement does not induce a teacher to retire early or, in fact, at all. The only relevant portion of the clause merely requires that a teacher who intends to retire must provide the Board with sufficient notice if the teacher wishes to take advantage of the terminal leave pay provision. Terminal leave pay is computed by means of a formula based upon the number of days of accumulated sick leave credited to the teacher and the terminal leave pay increases without limit as the total number of days of accumulated sick leave increases. The clause may be seen to function as an inducement for a teacher to remain in the system in order to accumulate additional sick leave and so receive a larger terminal leave payment at the time the teacher voluntarily decides to retire. There is testimony by Goin in the record as to the purpose of the terminal leave pay provision. He stated that he was informed by the personnel director of the district that the requirement of 18 months' notice was to

allow the Board sufficient time to accumulate the money needed to pay the benefit to the teacher at the time of retirement. This explanation is consistent with the fact that just three of the teachers who would have retired on June 30, 1990 would receive an accumulated payment in excess of $22,500. Based upon the foregoing, I **CONCLUDE** that nothing in the terminal leave payment clause of the collective bargaining agreement constitutes an inducement to retire in violation of the public policy of the State of New Jersey as set forth in Fair Lawn, id.

The terminal leave pay provision in question is a paragraph in the collective bargaining agreement which was negotiated between the representatives of the teachers and the Board. Under N.J.S.A. 34:13A-5.3, the representatives selected by the teachers for the purposes of collective bargaining function as the exclusive representatives for all teachers in the unit, whether or not they are members of the teachers' association, and the agreements which they negotiate with the school board cover all teachers in the unit and are binding upon them. See, Lullo v. International Ass'n. of Fire Fighters Local 1066, 55 N.J. 409, 430 (1970).

All the petitioners in this matter received copies of the collective bargaining agreement which was negotiated on their behalf by their teachers' association and it was incumbent upon petitioners to read the agreement carefully and to understand it or seek guidance as to its meaning before acting. It was especially important to make sure that the provisions were clear before undertaking such a significant act as submitting to the Board a notice of their intent to resign their position.

Petitioners' use of the terms "retirement and resignation" interchangeably when referring to the actions taken by the petitioners and the Board is inaccurate and merely serves to confuse the questions presented here.

> The status of Petitioner's employment was not altered by submission of papers to the Public Employees' Retirement System. As noted, when a district board properly accepts a tendered resignation, a termination date legally binding on both parties is established. It is of no moment for such purposes when or if the employee thereafter submits retirement papers to his or her retirement program. The Board and PERS are separate and

independent agencies functioning within unrelated areas of responsibility. Anne Hall, State Board Decision, May 5, 1989, p.7

The issues raised in this case have nothing to do with the petitioners' retirements.

I **CONCLUDE** that the issues raised here are, and have always been, solely: whether the Board could accept the teachers' conditional resignations and, if so, whether the teachers could rescind those resignations once they had been accepted by the Board.

N.J.S.A. 18A:28-8 provides that a tenured teaching staff member desiring to relinquish his position shall give the employing Board of Education written notice of his intention to resign. The teacher must have the intent to terminate employment when offering his resignation. Koszak v. Waterford Twp. BOE, 1976 S.L.D. 633. 638 (citing 78 C.J.S. 1101, 1102). The form in which notice of intent to retire is conveyed to the Board must only be in writing to satisfy the statute. I **CONCLUDE** that, in this case. where both parties voluntarily waived the requirement by the collective bargaining agreement for submission of a certification of retirement form, it was not necessary to submit this form to make their resignations legally effective.

N.J.S.A. 18A:27-4 gives the Board the sole authority to make rules governing the employment of teachers, including the approval of resignation of members of the teaching staff of the district. Petitioners in this case argue that an employee of the district represented to them that the Board would approve their resignation on a conditional basis and they would be allowed to rescind those resignations at a later time if they wished. The record reveals that there was no commitment by the Board to accept these resignations conditionally and petitioners "mistakenly relied on the opinions and assurances of the Board's administrators in concluding that a commitment had been made. Such reliance was misplaced, since opinions and assurances cannot stand in the stead of deliberate Board action. The Board alone has the ultimate authority to decide the employment of its teaching staff members." Brennan v. BOE. City of Pleasantville.

Atlantic Cty., 1977 S.L.D. 1059, 1062 (October 5, 1977) I, therefore, **CONCLUDE** that the Board is not estopped under Brennan from asserting that no agreement existed between it and the petitioners as to the conditional nature of the resignation submitted and the petitioners could not justifiably rely upon the representations of the personnel director of the district.

No equitable reasons exist for determining that petitioners had a right to rely upon the representations of Mildner that their resignations would be accepted on a conditional basis: Petitioners intended to have the Board commit to them that it would accumulate substantial sums of money on their behalf and engage in the process of recruiting teachers to replace them on their proposed dates of retirement. The Board did accumulate the funds which were received by the three petitioners entitled to them. In exchange for the Board's undertaking these obligations, petitioners wished to leave themselves free to resign or not, as they felt their own personal circumstances warranted, regardless of the expense and effort to which they had committed the Board. Three of the petitioners waited approximately one year before even attempting to rescind their resignations. I **CONCLUDE** that the Board was justified in relying upon the intentions of the petitioners to resign on their appointed dates in exchange for the obligations and inconveniences which it agreed to undertake. I, therefore, **CONCLUDE** that there is no merit in petitioners' argument that the Board committed an ultra virus act in accepting resignations deemed by petitioners to be conditional.

Petitioners' argument that rescission of the "contracts" arising from the offers of petitioners to resign and their acceptance by the Board should be allowed on the grounds of a mutual mistake by the parties is rejected. I **CONCLUDE** that the mistake, if any, was unilateral, on the part of petitioners, and that is not a reason to rescind these "contracts."

The law is clear upon the final issue raised by petitioners: Whether the Board's refusal to rescind its approval of their conditional retirement dates violates their tenure and/or seniority rights under N.J.S.A. 18A:28-5 and/or N.J.A.C. 6:3-1.10 et seq.

Petitioners attempted to rescind their resignations after they had been accepted by the Board. Acceptance of the petitioner's proposed rescissions was a matter within the Board's discretion. Anne Hall, State Board Decision, at p.8. in the absence of extraordinary circumstances such as those found in Evaul v. BOE, City of Camden, 35 N.J. 244 (1961). It is true that the 18-month period of notice required by the contract does leave open the possibility that circumstances could arise beween the time the staff member gave notice and his actual date of retirement which would make the prospect of retirement less attractive than it was at the time notice was given. However, petitioners are to some extent compensated for this risk by the additional payment which they can expect to receive because they tendered to the Board their early notice of intent to resign. The discretion of the Board cannot be reversed unless it is shown that its action was taken in an arbitrary or capricious manner. Anne Hall, State Board Decision, at 8.

I **CONCLUDE** that nothing in the record shows that the Board acted in an arbitrary and capricious manner in refusing to approve petitioners' attempted rescissions of their resignations. There is evidence that it did allow two other individuals in the last ten years to rescind their notices of intent to retire. The circumstances under which these rescissions were granted are not present in the record nor are they relevant.

In regard to the Board's failure to approve the rescission of the notice of retirement of Marilyn Cutler, I **CONCLUDE** that it cannot be said that the failure of the Board to allow rescission of her notice of intent to retire was arbitrary and capricious. The Board within its discretion could have allowed Cutler to remain after her intended retirement date and a different Board might have come to a different decision. Petitioner Cutler demonstrated no severe hardship nor did she prove any extraordinary circumstances which would render the decision of the Board unreasonable under Evaul, supra.

The case is different with Swotinsky and Goin, who simply changed their minds after submitting to the Board notice of their intent to retire: Swotinsky decided that she had a number of good teaching years left and that she would be in a better financial position if

she remained; Goin decided that, on reflection, he did feel well enough to continue working. There is nothing in the record that would support the conclusion that the Board's decision not to allow rescission of their resignations was arbitrary and capricious with respect to these two teachers, and I **CONCLUDE** that it was not.

In regard to Bates, nothing in the record explains why he submitted his notice of intent to retire to the Board 18 months before his proposed retirement date in order to qualify for a benefit to which he was not entitled; he did not even read the collective bargaining agreement and had no familiarity with its terms. He did not ask any questions. He simply submitted his resignation without further thought. After about four months, he went to the Board, asking them to extricate him from the situation into which he had placed himself. I **CONCLUDE** that their refusal to approve the rescission of his resignation was neither arbitrary nor capricious; they did exercise their discretion in favor of extending his retirement date from the one which he had requested to the end of the school term.

Based upon all of the above, I **CONCLUDE** that none of the petitioners is entitled to any relief in this matter since the actions of the Board in relation to each of them were within the discretion of the Board and were not arbitrary or capricious.

ORDER

It is, therefore, **ORDERED** that the action of the Board of Education of the Township of Parsippany-Troy Hills should be and hereby is **AFFIRMED** and;

It is further **ORDERED** that the appeals of petitioners should be and hereby are **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my initial decision with **SAUL COOPERMAN** for consideration.

April 2, 1990
DATE

Edith K. Klinger
EDITH KLINGER, ALJ

Receipt Acknowledged:

4/6/90
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 6 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

njf/e

MARILYN CUTLER ET AL.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioners filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4. The Board filed timely reply exceptions thereto.

Petitioners posit two exceptions, which are summarized in pertinent part below.

EXCEPTION #1

A BOARD OF EDUCATION CANNOT UNILATERALLY CONVERT A CONDITIONAL NOTICE OF RETIREMENT INTO AN UNCONDITIONAL RESIGNATION.

Petitioners claim that the letters they submitted to the Board were not resignations but, rather, were only notices of possible retirement reserving the right not to do so. Claiming that none of the letters uses the words "resign" or "resignation" (Exceptions, at p. 2), petitioners aver that in each of their cases, they "were giving an indication of current plans, not issuing a binding commitment." (Id.) They decry the ALJ's having found this to be true, but then concluding "that the Board was entitled to bind each teacher to a resignation they neither submitted nor intended. This conclusion is not justified in law or logic." (Id., at pp. 1-3)

Petitioners do accept that case law has established that when a person submits a voluntary and unconditional letter of resignation, which is accepted by the employer, such person has no automatic right to rescind the resignation. Petitioners state that this law derives from contract law. They cite F. Rupert Belles v. Wayne Township Bd. of Ed., 1938 S.L.D. 556 (1933); Kozak v. Bd. of Ed., Waterford, 1976 S.L.D. 633 and Austin v. Bd. of Ed., Mahway, 1955 S.L.D. 98 in support of this contention.

Petitioners further argue that there is a difference between resignation and retirement. They except to the ALJ's having found a conditional notice of retirement to be the equal of an unconditional resignation. They contend that the ALJ, not they, erroneously interchanged the terms "resignation and retirement"

contrary to her conclusion at page 17 of the initial decision. Petitioners submit that because they expressed only their intentions, their plans, their letters do not represent a commitment to quit. Thus, they argue, the Board's acceptance of their letters cannot bind them to quit since such acceptance cannot have any more power than was intended by the offer. Petitioners cite Kozak, supra, in support of their position in this regard.

Further, petitioners contend that even if the intent to retire is somehow deemed to be equivalent to a commitment to resign, the law of contract still applies and still bars the unilateral conversion of a conditional offer into one which is unconditional. They suggest that under New Jersey law no one is bound in contract unless the offer and its acceptance contain the same terms. In support of this proposition petitioners cite among other cases Johnson & Johnson v. Charmley Drug Co., 11 N.J. 526 (1953).

Petitioners also submit that it was within the Board's power to reject the conditional notice of retirement by insisting that the teachers either give unconditional commitment or forfeit their claim to terminal leave pay. Petitioners aver that the Board chose not to do so but, rather, unilaterally converted their notice into an unconditional resignation, without notice to petitioners. In so stating, the petitioners distinguish their situation from that of Anne Hall v. Bd. of Ed. of the Township of Jefferson, decided by the Commissioner October 20, 1988, reversed State Board May 3, 1989. In Hall, petitioners claim, the State Board held that an unconditional resignation is binding upon acceptance. However, they argue, a conditional notice of intent is conditional and is not binding except as to the terms of the condition. (Exceptions, at p. 7)

In this case, each petitioner established conditions which the Board did not have the power or the right to ignore or thwart, they claim. "Each petitioner was tenured and their forced termination was illegal. The Commissioner is asked to so hold." (Id.) Petitioners note that they are willing to repay any terminal leave pay received by them if they are awarded the relief requested.

EXCEPTION #2

THE CONTRACT PROVISION REQUIRING 18 MONTHS NOTICE OF INTENT TO RETIRE IS CONTRARY TO PUBLIC POLICY.

Petitioners avow that they have made no argument in this case that the matter should be heard before the Public Employee Relations Commission (PERC). They contend the ALJ's discussion at pages 14, 15 and 16 of the initial decision on this point indicates that the judge was confused. They claim the only jurisdiction issue raised was one reserved by the Board in the Prehearing Order but never argued or briefed by them. That issue related to whether the State Pension Division was the proper forum for petitioners' claim that the Board's terminal pay provision was illegal pursuant to Fair Lawn Ed. Assn. v. Fair Lawn Bd. of Ed., 79 N.J. 574 (1979).

Petitioners instead claim they did argue "that their notices of intent were submitted under a contract provision which, as now interpreted by the Board in this case, compels people to retire against their will." (Exceptions, at p. 8) They aver that if the revision in question had been as petitioners understood it, that is, if allowed to change their minds about retiring, it would be legal under Maywood Ed. Assn. v. Maywood Bd. of Ed., 131 N.J. Super. 551 (Ch. Div. 1974). However, petitioners argue, if the Board is permitted to force individuals to retire against their wills, the provision should be declared void under Fair Lawn, supra, because it forces more people into retirement than would otherwise be the case. By voiding said provision, their notices of intent to retire cannot be found binding because they were submitted pursuant to an illegal contractual procedure. Therefore, petitioners argue, their appeal must be upheld for this reason as well.

Petitioners seek reversal of the initial decision.

By way of reply to petitioners' exceptions, the Board submits the following:

REPLY TO EXCEPTION #1

A TEACHER CANNOT UNILATERALLY CONVERT A COLLECTIVELY-BARGAINED AGREEMENT TO GIVE 18 MONTHS PRIOR NOTICE OF RETIREMENT IN RETURN FOR THE RIGHT TO COLLECT TERMINAL LEAVE PAY INTO A "CONDITIONAL NOTICE OF RETIREMENT".

The Board claims the flaw in petitioners' argument is that it ignores the reason why petitioners submitted their notices of intent to retire, to collect terminal leave pay upon retirement. The Board cites the terms of paragraph 6 of the agreement, noting that the parties stipulated to the language contained therein. Nowhere in said provision, the Board avows, does a "notice of possible retirement" appear. (Reply Exceptions, at p. 3) The Board charges that "[s]uch a conditional notice was created by the petitioners in an attempt to obtain the benefit of the bargain (terminal leave pay) without the commitment obligation (giving the Board advance notice of a definite retirement date)." (Id.) It cites with accord the initial decision at page 19 in this regard. The Board further argues that a conditional notice of intent to retire that could be rescinded by the teacher at will would frustrate the purpose behind the requirement for prior notice and deny the Board the benefit of the bargain. It summarizes as follows:

> In making a decision to retire, teachers must weigh two competing rights -- their right to collect terminal leave pay and their right to retire by giving only 60 days prior notice (the basic retirement requirement found in N.J.S.A. 18A:28-8). The petitioners decided that they shouldn't have to choose between the two. They wanted their right to collect terminal leave pay while at the same time keeping their retirement

options open. As we have previously argued, this case arose because petitioners wanted to have their cake and eat it too.

(Reply Exceptions, at p. 4)

REPLY TO EXCEPTION #2

THE TERMINAL LEAVE PAY PROVISION REQUIRING 18 MONTHS PRIOR NOTICE OF INTENT TO RETIRE IS NOT CONTRARY TO PUBLIC POLICY.

The Board's reply exceptions support the ALJ's conclusion as found at page 16 of the initial decision stating that the 18-month advance notice requirement only applies if a teacher wishes to collect terminal leave pay upon retirement. The Board argues that if a teacher feels that he or she cannot plan that far ahead, then that teacher would not seek to collect terminal leave pay. If, however, a teacher gives terminal leave notice, the Board submits, the Board has a right to accept the notice and to rely upon it.

The Board further concurs with the ALJ that petitioners' argument that the provision in question violates Fair Lawn Ed. Assn., supra, is unfounded for the reasons expressed at page 17 of the initial decision. "Although Petitioners claim that Judge Klinger's conclusion is incorrect, they have provided no creditable argument to refute it. They have merely reiterated the same flawed argument that failed to persuade Judge Klinger." (Reply Exceptions, at p. 5)

The Board submits that the ALJ below correctly decided this case and it seeks affirmance of the initial decision.

Upon a careful and independent review of the instant matter, the Commissioner agrees with the findings and the conclusion of the Office of Administrative Law that the Board of Education in the instant matter was justified in relying upon the expressed intentions of the petitioners to resign on their appointed dates in exchange for the obligations which it agreed to undertake. See, Anne Hall, supra. In reviewing the exceptions of petitioners, the Commissioner notes that such arguments were fully addressed by the ALJ below. He concurs with the factual and legal conclusions expressed in the initial decision in response to said arguments.

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law dismissing the Petition of Appeal and adopts it as the final decision in this matter for the reasons expressed in the initial decision.

COMMISSIONER OF EDUCATION

MARILYN CUTLER ET AL.,	:	
PETITIONERS-APPELLANTS,	:	
V.	:	STATE BOARD OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF PARSIPPANY-TROY HILLS, MORRIS COUNTY,	:	DECISION
RESPONDENT-RESPONDENT.	:	

Decided by the Commissioner of Education, May 17, 1990

For the Petitioners-Appellants, Bucceri & Pincus
(Louis P. Bucceri, Esq., of Counsel)

For the Respondent-Respondent, Dillon, Bitar & Luther
(Myles C. Morrison, III, Esq., of Counsel)

The decision of the Commissioner of Education is affirmed for the reasons expressed therein.

October 3, 1990

Pending N.J. Superior Court

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8349-89
AGENCY DKT. NO. 296-9/89

MARILYN L. HORNER,
Petitioner,
v.
BOARD OF EDUCATION OF
KINGSWAY REGIONAL HIGH
SCHOOL DISTRICT,
Respondent.

Marilyn L. Horner, petitioner, *pro se*

Joseph F. Betley, Esq., for respondent (Capehart & Scatchard, attorneys)

Record Closed: March 5, 1990 Decided: April 3, 1990

BEFORE **NAOMI DOWER-LABASTILLE**, AU:

Marilyn L. Horner, school board member, filed a petition challenging the policy of the Board of Education of Kingsway Regional High School District (Board) which precludes individual Board members from reviewing materials relating to applicants being considered for employment except for those persons recommended by the superintendent of schools. On October 30, 1989, the Commissioner of Education (Commissioner) transmitted the matter to the Office of Administrative Law (OAL) for determination as a contested case pursuant to *N.J.S.A.* 52:14F-1 *et seq.*

A prehearing conference was held on February 5, 1990. It was determined that the case would proceed by summary decision motion. The record closed after receipt of the last responsive brief on March 5, 1990.

The facts include those admitted by the Board in its filed answer to the petition and in relevant documents such as minutes which were filed with the petition, which are deemed authentic. Petitioner added some additional facts, under oath, in her filed statement of February 9, 1990, which were not controverted by the Board's filing of February 23, 1990. The Board argues that these facts cannot be of record because my prehearing order limited the record to the facts admitted in the Board's answer and the relevant documents filed with the petition. My order was not intended to deny official notice to matters which are a part of public government records and the Commissioner's own files, namely, the constituency and composition of the Board of the regional district. The petitioner has brought this matter *pro se*, and is unaware of the procedural niceties involved, whereas Board counsel is aware that on a motion for summary decision, an adverse party must, by responding affidavit, set forth specific facts showing that there is a genuine issue of fact which must be heard. *N.J.A.C.* 1:1-12.5(b). If the Board disputed petitioner's general information concerning the Board's past practices, *i.e.* its committee organization, I feel certain a responsive affidavit would have been filed. In the interest of justice, I will therefore accept for the record the uncontroverted facts offered concerning general practices of the Board as well as the facts which can be officially noticed. I cannot, however, accept as facts any particularized testimonial material offered by the petitioner, even though I could have done so if a different procedure had been used. In any event, I do not find that the barred facts are necessary to a determination of the issues.

On February 13, 1990, petitioner amended her petition to request $52 in expenses on the case.

The following issues to be resolved are stated as follows in the prehearing order:

1. May a board of education, by adoption of a policy, expressly preclude individual school board members from reviewing personnel records, including application forms, interviewer summaries and/or administrator's notes relating to applicants being considered for employment, promotion, transfer, supervision or other disciplinary action?

2. May a board preclude individual school board members from reviewing all applications and other materials submitted by persons not currently employed who seek an open position?

3. Does the current policy, no. 4112.6, preclude any board member from reviewing personnel folders of current employees who were not recommended by the Superintendent for Board action, such as promotion, assignment, or transfer? Is so, is it valid?

Uncontroverted Facts

The Kingsway Regional High School District has a constituency consisting of the school districts of East Greenwich, South Harrison, Swedesboro and Woolwich. Of the nine-member Board, four members are from East Greenwich, two are from each of South Harrison and Swedesboro and one is from Woolwich. Petitioner is the incumbent member from Woolwich. The Board has a personnel committee which reviews applicants' records. Petitioner is not a member of this committee, which is appointed by the president.

The Board adopted a policy concerning personnel records, no. 4112.6, on March 3, 1986. The policy sets forth a procedure for maintaining both public and confidential employee records. The policy defines "public file" and "confidential file." The latter is available for examination "3. During regular business hours, or at any meeting of the board or any committee thereof, by any member of the board in connection with any assigned board responsibility or duty." The policy is consistent with no. 4212.6 recommended by the New Jersey School Boards Association.

On June 26, 1989, after a discussion regarding individual Board members reviewing applications of candidates who apply for positions at Kingsway Regional High School, the Board of Education passed a motion directing the acting Superintendent not to release personnel file information or candidates' applications to individual Board members, except for information which would be granted to the general public. They also directed that the matter be forwarded to the Board solicitor for review.

Petitioner was subsequently denied access to the applications of individuals who sought a position as field hockey coach and were not recommended by the administration.

On July 19, 1989, petitioner and another member made a motion that the Board authorize that all employment applications received by the administration be

made available for review to individual Board members, but the motion was defeated by a vote of two in favor and six opposed. At the same meeting the Board authorized a search for an acting and a permanent superintendent.

On August 2, 1989, the Board solicitor responded to the Board's request for a legal review, stating:

> You have asked for our opinion on whether an individual Board member has the right to review job application forms and other documents submitted by applicants to teaching staff positions or any other position within the school district.
>
> In our opinion, a Board member has the right to examine any and all personnel records, including application forms, interview summaries and/or administrator's notes, relating to an applicant or employee who is recommended or proposed for employment, promotion, transfer, suspension or other disciplinary action by the administration, as the case may be. Such examination should be made during normal business hours and in the office where the records are normally kept. However, this right does not extend to review of all personnel records of potential employees who are not recommended for hire. We are mindful that a Board member has the right and obligation to be fully informed when making employment decisions concerning applicants presented to the Board by the administration. However, to allow individual Board members to peruse through the personnel records of all applicants would fall outside the scope of their duties as a Board member, and at the same time raises serious privacy concerns of the applicants. Further, from a practical point of view individual Board member review of all applicants would hinder the administration in performing its essential function of screening and recommended candidates for hire.

After receipt of the solicitor's letter, on October 2, 1989, the Board adopted policy no. 9128 which states:

> BOARD MEMBER REVIEW OF EMPLOYMENT APPLICATIONS
>
> The Board of Education recognizes that screening, interviewing and recommending candidates for personnel action to the Board of Education is an administrative function to be carried out by the school district administration. The Board also respects and appreciates the need for confidentiality and privacy of persons who apply for all positions in the school district.
>
> Therefore, the Board of Education permits individual Board Members to review personnel record information for only the applicant(s) and/or employee(s) being recommended for employment, promotion, transfer, supervision, or other disciplinary action by the administration. This information

includes application forms, interview summaries and/or administrator's notes, relating to the applicant. Such examination should be made during normal business hours where the records are normally kept.

The Board of Education Members may review these personnel records as a committee, if the committee and its activities are approved by the Board. In any event, every precaution should be made to protect the confidentiality and privacy of applicants for positions.

Discussion and Conclusion

Since policy no. 4112.6 has not been repealed, the effect of the new policy is to restrict not only the Board members' access to information concerning out-of-district applicants but to restrict an individual Board member's access to the confidential personnel files of all current employees unless the Superintendent has recommended a specific action with respect to the employee.

The new policy intends this result, for it includes the actions of promotion, transfer and disciplinary action, actions which pertain only to employees. Thus Board members are now to be barred from in-district comparisons of employee personnel data, which is contrary to the impression given in the Board solicitor's opinion which states that a Board member has the right to examine any and all personnel records, but "this right does not extend to review of . . . records of potential employees who are not recommended for hire" (emphasis added). The new policy also imports new meaning into the interpretation of policy number 4212.6, by indicating that only a Board committee, "if its activities are approved by the Board" may review any personnel records, whereas the earlier policy stated that any member of the Board "in connection with any assigned board responsibility or duty" could review employee personnel records during regular business hours. The new policy is intended to define "in connection with any assigned board responsibility or duty" to apply only to duties of the personnel committee and to eliminate any argument that any "member of the board" could view personnel records as a part of a mere generalized duty.

No appellate court or State Board decisions on this subject have been brought to my attention. The Board cites two Commissioner decisions made twenty years ago but the parties do not agree upon their interpretation. In *Witchell v. Bd. of Ed. of City of Passaic,* 1966 *S.L.D.* 159, a board member was denied access to the personnel file of an employee recommended by the Superintendent for promotion.

The Commissioner held that the board member had the right to examine any and all personnel records prepared or maintained for the Board during regular business hours, when the records relate to an applicant or employee recommended or proposed for employment, promotion, transfer, or dismissal. His order was based on the rationale that, while the Superintendent's participation in screening and recommendation of personnel is indispensable, it cannot be proper and effective when some members of the board, by a vote of the majority, cannot have such full and complete access to personnel records as will enable them to make independent decisions. The Commissioner also accepted the conclusion of the hearing officer, which was that, while a board member has no authority to act as an individual, the member has prerogatives and responsibilities which give a status different from that of other citizens of the community. In the *Witchell* case, there was no issue raised concerning access to records of employees or applicants other than the single individual employee who was recommended for promotion. Board counsel reads this case as limiting access of Board members solely to information about an applicant/employee recommended by the Superintendent.

In a subsequent case, a board member sought access to personnel records after the Superintendent refused to show her applications and correspondence from persons seeking vacant positions. The Commissioner reaffirmed his decision in *Witchel*, but found that whether or not the board member was denied the information she requested was immaterial. *Mendell v. Cimmino, Supt., and Bd. of Ed. of Kinnelon*, 1970 *S.L.D.* 185. In *Mendell*, the board member agreed with the adopted policy of the board, that such information as needed and requested to arrive at an informed decision, if confidential, will be supplied at the next regular work meeting of the board to safeguard its confidential nature. Mendell did, in fact, receive the information she needed in accordance with the policy. Neither of the above cases addresses the broader issues raised by petitioner Horner.

Respondent's counsel argues that petitioner seeks to avoid her ethical restraints as a Board member and become a hands-on administrator. He notes that the Commissioner has cited with approval the New Jersey School Boards Association Code of Ethics, promulgated May 10, 1975, which includes the following averment:

> "3. I will vote to appoint the best qualified personnel available after consideration of the recommendation of the Superintendent."

I do not find the issue in this case to be whether or not a school board member can assume improper administrative functions. Petitioner is aware of and does not dispute the statutory duties of a superintendent under *N.J.S.A.* 18A:17-20 and the regulatory requirement of *N.J.A.C.* 6:3-1.12(f) that teaching staff cannot be hired without the superintendent's recommendation. Quite to the contrary, petitioner merely seeks the information necessary to perform her ethical mandate to vote to appoint the best qualified personnel available after consideration of the recommendation.

Petitioner needs complete information concerning any and all candidates for positions, whether initial positions with the district, promotions or transfers. Petitioner is aware of the rules of confidentiality with respect to personnel files and there is no suggestion whatsoever that she is less willing to abide by them than the several Board members who alone are permitted to review the files. It is solely the Board policy which prevents petitioner from having the information she needs. If there were any validity to the argument that giving petitioner information of this kind would be permitting her to usurp the Superintendent's function, then it would apply equally to any other Board members including the Board committee members who alone are permitted to view the applicant's files. Furthermore, if board members are to be denied applicant information, then it should be by statute or by rule of the State Board, adopted in proper form after notice and due consideration. Respondent has pointed to no statute or rule which bars a board member from full review of applicant information, so long as any applicable state law or rules of confidentiality are observed.

Without full information concerning the persons who apply for positions, whether employees or out-of-district applicants, a board member has no valid basis to vote for or against a candidate proposed other than the administration's recommendation. There is no way that the member knows whether or not, in the member's opinion, his or her vote is for the best qualified personnel available, unless we are intended to recognize as a matter of law that the Superintendent's recommended candidate is the best qualified candidate.

I cannot conclude that when our Legislature carefully mandated that board members must vote to hire staff, to transfer personnel and to certify tenure charges, the intention was that board members must either rubber stamp all recommendations of the administration or vote blindly against them. Our Legislature requires a recorded roll call majority vote of the full membership of the

board to appoint teaching staff. *N.J.S.A.* 18A:27-1. A similar requirement applies to transfers. *N.J.S.A.* 18A:25-1. Certifying tenure charges for removal requires a majority vote. *N.J.S.A.* 18A:6-11. A board member also has the duty to participate in the evaluation of a Superintendent. A majority of the board must prepare the superintendent's performance report. *N.J.A.C.* 6:3-1.22. If one of the district's goals is to appoint the best qualified personnel available, absent information concerning available applicants, a board member would be unable to evaluate the superintendent's activity in effectuating the goal. A superintedent's recommendations for staff positions are certainly significant considerations when the Superintendent's tenure must be decided. (The minutes submitted show that the district was in the process of searching for a chief administrator. The Board's position suggests that the personnel review committee could deny an individual member's access to superintendency applications.)

Petitioner iterates several relevant statements of the Commissioner concerning the important statutory duties of a board, such as appointing teaching staff members:

> . . .While the Commissioner would expect that all boards of education look to their professional employees for recommendations and guidance in matters in which educational judgments are to be made, the board is not compelled to accept the suggestions or advice it receives, for it has the authority to make the ultimate determination. *Weissmer v. Bd. of Ed. Borough of Wharton Morris Co.*, 1967 *S.L.D.* 125 at 127;
>
> The Board alone has the ultimate authority to decide the employment of its teaching staff members. As was previously stated in *Esther Boyle Eyler et al. v. Board of Education of the City of Paterson et al.*, 1959-60 *S.L.D.* 68, 71:
>
> > ***By the terms of *N.J.S.A.* 18:6-20 [now *N.J.S.A.* 18:25-1 and 27-1], the appointment, transfer or dismissal of principals and teachers and the fixing of their salaries require a majority vote of the whole number of members of the board. . . . It is well established that boards of education may not delegate the appointment of school personnel to committees or school officials.
>
> *Anna Brennan v. Bd. of Ed. City of Pleasantville, Atlantic Co.* 1977 *S.L.D.* 1059 at 1062;
>
> Petitioner . . .cites the fact that the Superintendent of Schools had recommended her continuation as principal and contends that contrary action by members of a board of education, who are non-educators, flies in the face of public policy and is patently arbitrary. Petitioner argues that the Commissioner should intervene, therefore, and afford petitioner a full

> hearing and countermand respondent's action. The Commissioner cannot agree.
>
> The Legislature has invested local boards of education with broad discretionary authority with respect to the day-to-day functioning of the public schools and in particular with the employment, assignment, compensation and dismissal of employees. . . . In this case, the Personnel Committee, after a reasonable period of study and evaluation in which it reviewed a number of reports and other factors recommended that petitioner, after a year's trial as a principal, be not continued in that position but be reassigned to classroom teaching. The Board of Education accepted the report of its Committee and acted on it. The decision was the subject of discussion and reconsideration at several subsequent meetings and remained unchanged. The action was entirely within the discretionary authority of the Board, and there is no showing that it was motivated by malice, discrimination or any other improper considerations. That it was contrary to the recommendation of the Superintendent and that it was by a split vote is not material.
>
> *Fitzpatrick v. Bd. of Ed. of Borough of Wharton, Morris Co.*, 1970 *S.L.D.* 149 at 152.

Respondent argues that the cited quotations are not useful because they are made in holdings which generally address situations where employees relied on administrations' promises of employment, when board action was required. They do, however, point up the importance of a board member's vote to hire, promote or dismiss. In the well known case, *North Bergen Fed. of Teachers et al v. Bd. of Ed. of Twp. of North Bergen*, 1975 *S.L.D.* 218 (aff. St. Bd. Nov. 8, 1978), the Commissioner reiterated with approval his 1976 position in *Karamessinis v. Bd. of Ed. of City of Wildwood*, 1976 *S.L.D.* 473:

> ***The Commissioner is duly concerned that, pursuant to statute, no board of education make important official decisions in a forum from which one or more of its members has been arbitrarily excluded. *Peter Contardo v. Board of Education of the City of Trenton, Mercer County*, 1974 *S.L.D.* 650 The function of local boards of education is of such paramount importance in developing and implementing programs of education to serve the youth of our State and nation that they must be ever guided by the principle that ***it is of the very essence that justice avoid even the appearance of injustice***. *James v. State of New Jersey*, 56 *N.J. Super.* 213, 218 (App. Div. 1959); *Hoek v. Board of Education of Asbury Park*, 75 *N.J. Super.* 182, 189 (App. Div. 1962) A reading of the statutes and case law can lead only to the conclusion that official acts of boards of education must not be reduced to a sham by the predetermined actions of factual segments of boards without full, frank, and open

> discussion and full knowledge of all *bona fide* members. *** [at 478;emphasis added]

This case is not about interference with administration or usurpation of powers. It is not about a demand to interview candidates and make independent recommendations to the Board. Petitioner simply wants information without which she cannot make an informed vote to hire, promote, grant tenure or nonrenew a contract. The information is made available, if at all, only to certain Board members appointed by the president.

A board member is elected by the people and given authority and a mandate to vote by the Legislature. To remove from the member the information needed to make an intelligent vote is to make a sham of the electoral process for governance of our schools. It is, by local fiat rather than legislative process, to diminish the powers of elected members. It is tantamount to directing that the recommendation of a chief administrator must be accepted by a board, on penalty of voting arbitrarily to reject it, since there is no rational basis to judge its validity without the availability of information concerning other candidates for the position. The situation is the more egregious because petitioner is the sole representative of a regional constituency, but that fact does not compel my conclusion that Board policy no. 9128 is arbitrary and unreasonable. It is because that policy is inconsistent with and obstructive of the intent of the Legislature in mandating that all appointments and transfers be made by a vote of the majority of members of the full board.

Since Board counsel has averred in his brief that the current policy permits individual Board members to review a complete personnel file concerning an employee against whom the administration has recommended an action, it is not necessary to consider its applicability to persons recommended for disciplinary action. There are no "candidates" for such action, thus the above rationale does not apply and I rely on Board representation that such personnel files will be available for review by Board members during normal business hours.

On the subject of petitioner's request for costs of suit of $52, it must be denied. The Commissioner has long held that he has no jurisdiction to award costs or damages. *Spizziri v. Bd. of Ed. of Borough of Mauklin Lakes*, 1989 *S.L.D.* , May 18, 1989. The *Matawan* case is not applicable in the circumstances here. I agree with the Board's position on this point, but would note that I feel it inappropriate for a board to demand counsel fees against a *pro se* board member on grounds that the petition filed is legally frivolous.

It is therefore **ORDERED** that the Board's policy no. 9128 is invalid to the extent that it limits an individual Board member's access to the personnel records and application forms, interview summaries and/or administrator's notes of only the applicant or employee who is recommended by the administration for employment, promotion, or transfer.

It is therefore **ORDERED** that the administration make available for review the complete personnel files and applicant information of all persons considered for positions in accordance with this decision during regular business hours within a reasonable time prior to the proposed Board action.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with **SAUL COOPERMAN** for consideration.

April 3, 1990
DATE

Naomi Dower-LaBastille
NAOMI DOWER-LABASTILLE, ALJ

Receipt Acknowledged:

4/4/90
DATE

DEPARTMENT OF EDUCATION

Mailed to Parties:

APR 5 1990
DATE

OFFICE OF ADMINISTRATIVE LAW

ct

MARILYN HORNER,	:	
PETITIONER,	:	COMMISSIONER OF EDUCATION
V.	:	DECISION
BOARD OF EDUCATION OF THE KINGSWAY REGIONAL HIGH SCHOOL DISTRICT, GLOUCESTER COUNTY,	:	
RESPONDENT.	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed, as have exceptions by respondent and replies by petitioner, both timely filed pursuant to N.J.A.C. 1:1-18.4.

In its first exception, respondent (hereinafter "the Board") argues that the initial decision should be rejected on its face because it is tainted throughout by an erroneous assumption or misconstrual of fact, namely that the Board's personnel committee is allowed access to all applicant files, rather than only to those of candidates recommended by the superintendent, while petitioner (hereinafter "Horner") is not. The Board observes that there is no basis for this "fact," nor was it alleged by Horner; and that, to the contrary, the personnel committee has access only to files of candidates recommended by the administration (supported by affidavit of Board Secretary Philip Nicastro). This being the case, the Board seeks a remand to address the pertinent issues based on a "clean" factual record.

In the alternative, if the Commissioner chooses to build from the ALJ's decision without reference to this factual error and the flawed analyses stemming from it, the Board raises four additional exceptions. First, the ALJ has ignored or misunderstood binding precedent in her discussion of Witchel, supra (erroneously cited as "Witchell"), and Mendell, supra. These cases, argues the Board, stand plainly for the proposition that board members should have access only to records relating to an applicant or employee recommended or proposed for employment, promotion, transfer or dismissal. Thus, Horner's appeal must be dismissed by reason of stare decisis.

Second, the Board contends that the ALJ erred in concluding that usurpation of administrative powers was not an issue in this case, arguing instead that it lies at the heart of the matter. In effect, Horner would have board members who do not necessarily have expertise or experience in education make administrative and evaluative determinations independent of, and perhaps in opposition to, those of the superintendent; the result would be chaos, with the superintendent's authority, judgment and ability to run the district continually undermined. Third, the ALJ's conclusion violates the statutory and regulatory framework wherein the superintendent is explicitly charged with general supervision of the district and

recommending formal appointment of all teaching staff members. (N.J.S.A. 18A:17-20, N.J.A.C. 6:3-1.12(f) and N.J.A.C. 6:8-4.3(a)6(vii)) Such violation was explicitly prohibited by the Commissioner in Michael Ross v. Bd. of Ed. of the City of Jersey City, Hudson County, decided March 9, 1981, affirmed State Board October 7, 1981, wherein the Board took the initiative to appoint two assistant superintendents without their having been nominated by the superintendent.

Fourth, the Board argues that the ALJ erred in holding that its current policy requires either a "rubber stamp" of the superintendent's recommendation or a blind vote against it. Rather, it provides a system of checks and balances between the Board, which establishes policies and guidelines for employment, and the superintendent, who acts within those guidelines to review applications, interview candidates, compare qualifications and recommend the best candidate to the Board. The Board is not bound by the superintendent's recommendation, but can vote for or against it. Repeated rejection of the superintendent's recommendations may "cause a negative evaluation of the superintendent [but] does not warrant the abdication of the superintendent's exclusive role in recommending candidates for hire." (Exceptions, at p. 17) This procedure makes practical sense and, unlike the decision of the ALJ, is fully consistent with the New Jersey School Boards Association Code of Board Member Ethics, wherein involvement of individual Board members in the selection/nomination of school personnel and in "hands on" administration of the district is clearly proscribed.

In reply, Horner contends that the Board's objections are speculations and obfuscations which do not reach to the central issue of whether a Board member has the right, as a matter of law, to review applications of all candidates rather than only those recommended by the superintendent.

In the interest of Board members being able to make informed decisions, she urges acceptance of the ALJ's conclusions and argues that the "Board majority should not be able to dictate ignorance for all board members, just because [they] choose ignorance for themselves." (Reply Exceptions, at pp. 2-3)

Upon careful consideration of this matter, the Commissioner concurs with the basic thrust of the ALJ's reasoning, but declines to fully affirm her discussion, conclusions and orders for the reasons stated below.

Initially, the Commissioner notes that the substance of Horner's petition relates to access to files of applicants for employment, not to files of employees recommended for promotion, transfer, supervision or other disciplinary action. However, the seminal Commissioner's decisions in this area (Witchel, supra, and Mendell, supra) do not distinguish between these two groups, and the resulting fusion is reflected in the wording of the Board policies at issue herein, the language of Horner's prayer for relief and the ALJ's framing of the issues. It is this melding that leads the Commissioner to view the initial decision with caution, as its unqualified application would appear to extend the same right of Board member access to personnel records in general as to

applications for district employment, a result which the Commissioner would adamantly oppose.

Applications for employment and personnel records are by nature two very different commodities. The former is voluntarily proffered by a potential employee with an express expectation of review and evaluation (subject, of course, to ordinary considerations of confidentiality) and is informed by a mutual understanding as to the limitations of its usage. The latter, on the other hand, is a comprehensive repository of information compiled for a multitude of actual and potential purposes, a cumulative history which is both potentially sensitive and intrinsically confidential. The Commissioner regards it as both crucial to personal privacy and consistent with established public policy to distinguish between these documents in terms of Board member access.

With respect to applications for employment, the Commissioner fully concurs with Horner and the ALJ that Board member access to official applicant materials is essential to ensure that each Board member's vote for or against the recommendation of the chief school administrator (hereinafter "CSA") is an informed one. In so holding, he rejects the Board's contention that Witchel, supra, and Mendell, supra, stand for the proposition that access is to be limited to only those candidates recommended by the CSA. Rather, he holds that the fact pattern of Witchel (upon which Mendell relied) spoke to a situation where the access denied was to the file of the recommended candidate, so that the Commissioner had no occasion to rule on the more general question of access to files of persons not so recommended. The Commissioner sees in these decisions no indication of any intent to establish exclusionary limitations on such access; the rulings therein merely confined themselves to the issues at hand.

In so holding, however, the Commissioner emphasizes that such right of access in no way entitles Board members to nominate candidates independently of the CSA's recommendation. Such a result would be contrary to the established statutory and regulatory framework (discussed in the Board's exceptions above) and would constitute an altogether inappropriate intrusion into district operations. Rather, right of access is intended solely to permit an informed judgment as to whether the CSA's recommendation will enable the Board to meet its responsibility to hire the best qualified staff. Nor does such access lessen Board member responsibility with respect to applicant confidentiality rights, permit review of administrators' personal notes not incorporated into documents such as evaluation forms or interview summary sheets, or remove the administration's right to place reasonable limitations on conditions for review (e.g., on premises, during regular business hours, etc.). Neither does it require that the CSA distribute all candidate information to all Board members, only that they have access to it under reasonable conditions.

With respect to district employees, however, the Commissioner firmly adheres to the belief that Board member access to confidential personnel files should be strictly limited to those instances where the employee is being recommended for or subjected

to an employment action requiring a vote of the Board or where access to personnel information is necessary for the performance of essential Board member duties. In the former case, Witchel, supra, and Mendell, supra, have long established that Board members are to have access to "any and all personnel records prepared or maintained for the Board of Education by its officers or employees, during regular business hours." (Witchel, supra, at p. 162) Herein, however, the Commissioner refines that standard to clarify that while access to employee file materials may be unlimited as to type, the extent of access on any given occasion must be governed by the degree to which such materials are directly relevant to the specific employment action proposed to be taken by the Board. Board members may have access only to those portions of pertinent files which contain information without which they cannot perform an assigned duty of office, and any such access is to be gained through the CSA who is the custodian of district personnel records, as it is when the access sought is to similarly protected pupil records pursuant to N.J.A.C. 6:3-2.1 et seq. To hold otherwise would both make a travesty of employee expectations of reasonable privacy and serve as an invitation to all manner of abuse.

Because the Commissioner views the parameters set forth above as flowing from basic rights and responsibilities of board members as the elected or appointed trustees of the public educational system, he further holds that they cannot be thwarted by adoption of a policy that would produce a result to the contrary. Simply put, the majority cannot be permitted to deny the minority its rights and prevent it from lawfully acting to meet its sworn obligations.

Moreover, the Commissioner views these parameters as consistent with both prior case law, of which they serve as a clarification and refinement, and more recent State policy on access to personnel files of public employees as embodied in Executive Order No. 11, promulgated in 1974 by then-Governor Brendan Byrne. In holding that, except for basic information on title, salary, length of service, separation, pension and compliance with experiential and educational requirements for the position held, an instrumentality of government shall not disclose individual personnel records to anyone unless authorized by law or when essential to the performance of official duties, State policy clearly recognizes the employee's right to privacy, the governmental entity's responsibility as custodian of records and the public official's occasional need for a standard of access above that accorded to ordinary citizens.

Finally, the Commissioner views these parameters as consistent with the statutory and regulatory role of the CSA, whose authority and responsibility are not compromised thereby, and as providing for a balance among Board member rights and obligations, employee privacy expectations and the administration's proper presumption that Board members will not interfere in the actual operation of the district.

In reaching these conclusions, the Commissioner rejects the Board's contention that the initial decision of the ALJ was so tainted by factual error that a remand was necessary as a result. Instead, while he acknowledges the ALJ's error, the source of which

appears to have been her reading of the two pertinent policies in conjunction (Initial Decision, at p. 5), he holds that those statements in her discussion and conclusion which arise from this misunderstanding speak mainly to fairness and equality among Board members and can be extracted and discarded without harm to either the central issues herein or the ALJ's basic line of reasoning. (Statements to be set aside as erroneously based are p. 5, para. 2; p. 7, para. 2, lines 3-12; p. 8, para. 1, lines 11-13; and p. 10, para. 1, lines 5-6. Page 9, para. 2, lines 5 ff. is somewhat related, but can properly be retained in application to the question of whether a Board may limit individual member rights by adoption of a policy to that effect.)

Further, in a brief introduction to its exceptions, the Board notes that because Horner did not run for reelection after filing her petition and is hence no longer a member of the Board, questions of mootness and standing are left to the Commissioner's discretion. Here the Commissioner holds, consistent with the ALJ's position in preconference according to Horner's reply exceptions (at p. 1), that Horner had standing at the time her petition was filed and that the nature of her complaint reaches to an ongoing issue of major importance such that it cannot be rendered moot solely by her departure from the Board.

Accordingly, the initial decision of the Office of Administrative Law is modified to hold that Board members, individually or as a group, shall have reasonable access to the official files of all applicants for employment and to the personnel files of current employees recommended to the Board for employment action to the extent that such files are relevant to the specific action to be taken or deemed pertinent by the CSA in response to the Board's directive to provide information essential for performance of a specific, officially assigned Board duty. To the extent that the respondent Board's policy nos. 4112.6 and 9128 are contrary to these holdings, they are hereby declared null and void.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 5575-89
AGENCY DKT. NO. 205-7/89

LEON WILBURN,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,
Respondent.

Stephen B. Hunter, Esq. for petitioner
(Klausner, Hunter & Oxfeld, attorneys)

Sidney A. Sayovitz, Esq., for respondent
(Greenwood, Young, Tarshis, Dimieto & Sayovitz, attorneys)

Record Closed: March 28, 1990 Decided: April , 1990

BEFORE **JAMES A. OSPENSON**, ALJ:

Leon Wilburn, a tenured teaching staff member employed by the Board of Education of the Township of Teaneck, Bergen County, filed a petition of appeal on June 30, 1989 with the Bureau of Controversies and Disputes of the Department of Education in which he alleged that the Board refused to allow him to rescind a letter of resignation that he had submitted in fulfillment of terms of a settlement agreement with the Board of a tenure charge matter that was subsequently rejected by the Commissioner of Education. The Board's answer on July 21, 1989 and July 28, 1989, denied petitioner was entitled to judgment approving rescission of his resignation, which it said was otherwise voluntary, alleged the Board had complied with its obligations under the settlement agreement, and alleged affirmatively the petition was untimely under N.J.A.C. 6:24-1.2. The Commissioner transmitted

the matter to the Office of Administrative Law on July 28, 1989 for hearing as a contested case in accordance with N.J.S.A. 52:14F-1 et seq.

On notice to the parties, the matter came on for a prehearing conference in the Office of Administrative Law on September 7, 1989, and an order was entered. The following issues were isolated:

1. Did the Board's refusal to rescind its acceptance of petitioner's letter of resignation (a) contravene his tenure status pursuant to N.J.S.A. 18A:28-5; or (b) contravene provisions of the Tenure Employees Hearing Act, N.J.S.A. 18A:6-10 et seq.?
2. If so, what remedy, if any, is appropriate?
3. Is petitioner barred from bringing this action by virtue of the 90-day rule, N.J.A.C. 6:24-1.2?

The matter was initially set down for hearing on December 8, 1989. On October 20, 1989, the Board filed a motion for summary decision in its favor asking the petition be dismissed on the grounds that he is legally bound by the Board's acceptance of his letter of resignation, and, even if he were not, his petition was barred by N.J.A.C. 6:24-1.2(b). On November 28, 1989, an administrative law judge concluded in a written decision that existence of disputed facts made summary decision inappropriate. The motion was denied; the matter was ordered to proceed to hearing. Thereafter, the hearing date of December 8, 1989 was adjourned at request and/or with consent of the parties. The matter was heard on March 28, 1990 and concluded. The record closed then.

GENERAL BACKGROUND

On February 25, 1988, inefficiency tenure charges were certified against petitioner by the Board. Transmitted to the Office of Administrative Law to be heard under docket number EDU 2971-88, the matter was settled by a stipulation of settlement and dismissal between the parties and approved by an administrative law judge subject to approval of the Commissioner. In a decision on November 28, 1988, the Commissioner refused to accept the stipulation of settlement and remanded the matter to the Office of Administrative Law for further proceedings. Under OAL docket number EDU 8840-88 (EDU 2971-88 on remand), negotiations between the parties resulted in a second stipulation of settlement and dismissal. The second

stipulation and initial decision approving it were rejected by the Commissioner on April 25, 1989. The matter was again remanded to the Office of Administrative Law for further proceedings. At the present time, the tenure case is inactive pending resolution of the present matter.

On May 30, 1989, petitioner attempted to rescind his resignation (J-5), petitioner having noted in his letter to the Board that a second stipulation of settlement and dismissal of tenure charges had been rejected by the Commissioner. The Board's refusal to allow petitioner to rescind his resignation is the subject of the present appeal.

ADMISSIONS, STIPULATIONS AND FINDINGS OF FACT

The parties having so admitted and/or stipulated, I make the following findings of fact:

1. Petitioner is a tenured teaching staff member employed by the Board. He holds elementary teacher certification. He holds no teacher of art certificate endorsement. His curriculum vitae is P-1 in evidence.

2. The first stipulation of settlement and dismissal of tenure charges effected by the parties (there were two agreements; J-1 and J-2) was in place, according to stipulation of the parties, by October 8, 1988, although all essential terms thereof had previously been in place and in the minds of the parties by August 1988. Essentially, petitioner agreed forthwith to submit his letter of resignation, to become effective June 30, 1989, in consideration of his employment at 7/10ths salary basis for 1988-89 and duties to be outlined and assigned him (J-2). At conclusion of employment, the Board would withdraw tenure charges of inefficiency. J-1, paragraph 3. Unstated, but necessarily implied, was that settlement and withdrawal of charges was subject to approval by the Commissioner of Education.

3. Expressly in consideration of the agreements in J-1 and J-2, petitioner tendered a resignation from his teaching position in the district on

August 19, 1988, to become effective at the close of the 1988-89 school year, that is, June 30, 1989. J-6.

4. At its public meeting on September 14, 1988, the Board accepted his resignation, effective June 30, 1989. J-7.

5. Petitioner and John Cowen, director of curriculum and instruction, conferred on September 15, 1988 about petitioner's 7/10ths employment position assignment for 1988-89. Petitioner by agreement was to review the 1988 art curriculum for grades K-2 and 6-12; provide consultation regarding art needs for an administrative office complex; illustrate new and revised curriculum guides; work on art projects that were multicultural and diverse; expand African history study through art for integration into other curricular areas; research model curricula in the arts; and research current trends and education for artistically talented children. It was understood petitioner's work would be monitored by an assistant superintendent. R-1 and R-2.

6. Petitioner was officially advised that he had been employed from September 1, 1988 through June 30, 1989 at 7/10ths salary. J-9 and J-8.

7. The Commissioner rejected the first agreement of settlement and dismissal on November 28, 1988. The tenure charge matter was remanded.

8. An internal memorandum from the director of curriculum and instruction on April 28, 1989 memorialized that petitioner would be undertaking to finalize the art curriculum project he had been assigned the previous Fall. R-3.

9. Petitioner was notified by an assistant principal on May 12, 1989 that he had not availed himself of the district's educational credit payment plan, under which cost of his educational courses for completion of art K-12 certification could be defrayed. Petitioner never did seek such course work and remains uncertified in that endorsement. R-4.

10. The second agreement of settlement and dismissal was effected on February 27, 1989 and approved by an administrative law judge. On April 19, 1989, petitioner's attorney notified the parties and the Commissioner of Education that petitioner considered the agreements concluded between him and the Board (J-1, J-2 and J-3) had not been fulfilled. He requested the Commissioner to reject the modified stipulation of settlement (J-3) and remand the tenure matter to an administrative law judge for further proceedings. J-4.

11. After rejection and remand of the second stipulation of settlement and dismissal on April 25, 1989, petitioner notified the Board on May 30, 1989 that he was rescinding his letter of resignation, which he had submitted in fulfillment of his obligation under the agreements, on the ground the resignation was but one part of the settlement, was not a separate entity, and was vitiated once the settlements were disapproved by the Commissioner. J-5. The Board refused. See paragraphs 14 of petition and answer.

DISCUSSION

Petitioner argued generally (1) that the Commissioner's disapproval of settlements rendered his resignation letter a nullity, being part of a repudiated agreement; (2) that the Board's failure to comply with its contractual obligations pursuant to the agreements discharged any obligation on petitioner's part to resign his teaching position; and (3) that the present petition of appeal was not barred by the 90-day limiting period in N.J.A.C. 6:24-1.2(b).

The Board argued (1) that the tendered resignation was legally binding upon petitioner upon acceptance of it by the Board; (2) that the Board had fulfilled its obligations to petitioner under the settlement agreements by employing and compensating him for 1988-89; (3) that the present petition of appeal was untimely; and (4) that the bargained-for resignation, therefore, should be enforced against petitioner and the petition of appeal dismissed.

The subject of rescinding of employee resignations was perhaps most recently dealt with in Hall v. Board of Ed., Township of Jefferson, Morris County, 1989

S.L.D. ___ (State Board, May 5, 1989), in which the State Board noted approvingly the following generality:

> It is clear, as a general rule, that a board of education may refuse to honor an employee's attempt to rescind resignation after the board has formally acted to accept it, where the attempted rescission comes before the effective date of resignation. Kozak v. Board of Ed., Township of Waterford, 1976 S.L.D. 633. A resignation is properly accepted when the board does so by resolution; it cannot thereafter be unilaterally withdrawn by the employee. Cohen v. Board of Ed., Township of Hacketstown, Warren County, 1979 S.L.D. 439, 441-2. Only in circumstances involving unusual equitable considerations, apparently, has the court ever allowed rescission of resignation after board acceptance; circumstances in the case, however, were described as an "extraordinary concatenation of events." Cf., Evaul v. Board of Ed., City of Camden, 35 N.J. 244, 249 (1961). There is none here. [Ibid; slip opinion at 4].

In the Hall case, resignation rescission was not allowed; in Evaul, rescission was allowed. In both cases, equitable principles on particular facts of each case were applied to reach their opposite results. In particular, examination was made to determine whether representations in the resignations for future date were justifiably relied upon by the boards involved. Both cases examined whether the boards reasonably changed position to their detriment in reliance thereon.

Equitable principles, applied here, require examination whether the Teaneck Board in seeking enforcement of the resignation justifiably relied upon it theretofore to its detriment. There is no question the Board relied upon the resignation it accepted when it continued to employ and compensate petitioner for the 1988-89 school year. But the hard question the Board cannot answer is whether its reliance on a future resignation and a detrimental position change by employment of and compensation to petitioner were reasonable at the time in 1988 under then existent circumstances. Board reliance was not reasonable, it may be seen, if the settlement agreements of which the resignation formed a dependent covenant had not been and thereafter never were approved by the Commissioner. In short, the Board took the risk of non-approval on its own responsibility. In Tenure Hearing of Cardonick, Bd. of Ed., Bor. of Brooklawn, 1982 S.L.D. ___ (Apr. 7, 1982); aff'd State Bd., 1983 S.L.D. ___ (Apr. 8, 1983), tenure charges were "settled" by a lump sum payment of $24,873 by the board to the teacher, who gave his resignation.

It was accepted. Payment was made before Commissioner approval, which was not forthcoming. The State Board affirmed the Commissioner's holding that such change of position was premature and without legal authority. The teacher's tenure rights remained as intact as they were at the time the ultra vires agreement was struck. Ibid., Com'r's decision; slip opinion at 7-8; St. Bd. decision, slip opinion at 4-5.

Equitable principles, therefore, disfavor the Board. Even if that were not the case, the Board's position cannot surmount the circumstance that petitioner's resignation of August 19, 1988 (J-6) upon its face announced a conditional tender. Not only was it conditional upon the Board discharge of obligations under the settlement agreements, which were executory in nature and would not be so discharged until end of the school year ten months in future, but by necessary implication of law the agreements themselves were conditional upon approval by the Commissioner. When the condition failed, as it ultimately did for the second time on April 25, 1989, equity decrees the parties be left where they were at time of execution.

Based on the foregoing, I **CONCLUDE** as follows:

1. The settlement agreements of 1988 and February 1989 (J-1, J-2 and J-3) were by operation of law conditional upon approval by the Commissioner of Education.

2. Petitioner's resignation of position on August 19, 1988 to become effective June 30, 1989 (J-6) was not tendered in isolation or independently of mutual obligations of the parties in the settlement agreements. To that extent, therefore, the resignation was not only conditional upon fulfillment of the mutual obligations of the settlement agreements but more fundamentally dependent upon Commissioner approval. In substance and reality, the resignation was conditioned upon a condition.

3. The settlement agreements as executed and presented for approval remained conditionally valid only until disapproval by the Commissioner on February 25, 1989. The petition of appeal here was filed less than 90

days thereafter and was thus within the limiting period of N.J.A.C. 6:24-1.2(b).

4. In employing, assigning and compensating petitioner for 1988-89 in advance of Commissioner approval, the Board unreasonably assumed the risk inherent in failure of approval. Petitioner is neither estopped for equitable reasons or barred by legal reasons from rescinding his resignation by the Board's voluntary if incautious change of position before approval. Agreements and resignation are nugatory. Petitioner's tenure rights remain intact.

5. Judgment rescinding petitioner's resignation of August 19, 1988 to become effective June 30, 1989 (J-6) is hereby **ENTERED**; the Board's affirmative defense of untimely filing of petition is **DISMISSED**.

6. Tenure charges against petitioner shall proceed to hearing in usual course.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10(c).

I hereby **FILE** this initial decision with **SAUL COOPERMAN** for consideration.

April 4, 1990
Date

JAMES A. OSPENSON, ALJ

Receipt Acknowledged:

4/9/90
Date

DEPARTMENT OF EDUCATION

Mailed to Parties:

April 9, 1990
Date

OFFICE OF ADMINISTRATIVE LAW

amr

LEON WILBURN,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF TEANECK, BERGEN COUNTY,	:	DECISION
RESPONDENT.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The Board's exceptions and petitioner's reply thereto were timely filed pursuant to N.J.A.C. 1:1-18.4.

The Board's exceptions urge that the ALJ's decision plainly ignores well-established law that a teacher's resignation is legally binding upon proper acceptance by a board of education and cannot be rescinded or modified except in compelling equitable circumstances. It cites Evaul, supra; Hall, supra; Kozak, supra; Cohen, supra, in support of this.

The Board further avers that the only exception to the rule set forth above was contained in Evaul, supra, wherein the court indicated rescission of a resignation may be permitted under circumstances where a teacher acted irrationally or had insufficient time to reconsider the resignation prior to board of education action. As such, it maintains that the ALJ ignored the Supreme Court rule in Evaul because there were no findings that the resignation was given in an emotionally, volatile time or was occasioned by impetuous conduct or under coercion. (Board's Exceptions, at p. 4)

The Board also argues that the ALJ's conclusion that petitioner's resignation was conditioned on subsequent Commissioner approval of the overall settlement between the parties is neither supported by established case law nor equitable considerations. Of this it states, inter alia, that:

> Initially, it must be emphasized that the letter of resignation was dated August 19, 1988 but the settlement agreements were not finalized until October 5, 1988 when they were submitted to the Office of Administrative Law. Had petitioner wished to submit a conditional letter of resignation, he should have made his intentions known to the board of education. Alternatively, petitioner could have chosen to delay the submission of his letter of resignation until after the Commissioner had the opportunity to

review the settlement agreement. Since there have been no findings that he was coerced or forced to submit his letter of resignation, there can be no relevance attached to the Commissioner's failure to ultimately accept the settlement. The finding by Judge Ospenson that the letter of resignation was expressly conditional upon the Commissioner's later acceptance of the settlement agreement is neither reflected in the letter of resignation itself nor in the board resolution accepting the letter of resignation. A close analysis of the letter of resignation indicates that Mr. Wilburn noted therein that "in consideration of the agreements concluded between myself and representatives of the board of education I hereby tender my resignation..." As noted earlier, the agreements were not final at the time of the letter of resignation. In addition, as noted in Initial Decision, the agreements themselves do not indicate that the letter of resignation was conditional upon Commissioner's acceptance of the settlement.

The effect of Judge Ospenson's creation of the concept of a conditional letter of resignation will be to create a new legal principle that will have damaging effects upon the relationships of a board of education and its employees. Affirmance of Judge Ospenson's decision will establish precedent that a letter of resignation may be conditional upon future events which could have the effect of retroactively permitting the employee to rescind his resignation. this is contrary to the admonition of the Supreme Court in Evaul that a board of education must be permitted to take conclusive steps to replace retiring employees and must be entitled to rely upon the effective date of a tendered and accepted resignation. This is especially true in the present circumstances because the letter of resignation did not advise the board of education that it was conditional upon the Commissioner's acceptance of the settlement. The effect of Judge Ospenson's decision is to permit the petitioner to utilize his inner, uncommunicated, thoughts so as to nullify the board's acceptance of the letter of resignation. Clearly this is not in the public interest and will serve to encourage employees to write ambiguous letters of resignation which neither communicate their true intent nor provide any degree of finality to the status of the parties. (Id., at pp. 4-5)

In addition to the above, the Board excepts to the ALJ's conclusion that the petition was timely filed. It urges that such a

conclusion allows petitioner to reopen an issue finalized on September 14, 1988 which was 9¼ months prior to his filing of the petition. It states:

> It is curious that Judge Ospenson, in rejecting the board's ninety day argument, concluded that the board in employing petitioner for the 1988-1989 school year "unreasonably assumed the risk inherent" in the failure of the Commissioner to approve of the settlement. Yet, Judge Ospenson plainly ignored that it was petitioner who chose to submit his letter of resignation in August, 1988, months before Commissioner review of the settlement agreement was even feasible since an agreement had not been executed nor submitted to an Administrative Law Judge.***
>
> It is respectfully urged when an employee chooses to submit a letter of resignation without coercion or duress, he must be made accountable for his later decision to change his mind. A simple letter attempting to rescind a letter should not serve to reopen the ninety day limitations period. Finally, it must be emphasized that the Initial Decision serves to punish the board of education for its acceptance of a letter of resignation on September 15, 1988. It is the board of education that acted in good faith, but it is the petitioner who changed his mind more than 9¼ months later. Equitable principles as well as established law require that the ninety day rule be applied to preclude petitioner from reopening the decision that he voluntarily made on August 19, 1988.
>
> (Id., at pp. 6-7)

Petitioner's reply exceptions urge affirmance of the ALJ's recommended decision for the reasons expressed therein. He also avers that the testimony of the witnesses during the hearing "***further substantiated an alternate basis for *** sustaining***" the decision, i.e., his being assigned essentially clerical functions during the 1988-89 school year. (Reply Exceptions, at p. 2) Of this he states:

> For the reasons set forth in the annexed Brief the duties assigned to Leon Wilburn were of considerable importance to him and the promise of the assignment of the professional duties designated in the settlement agreements at issue played an extremely important role regarding Leon Wilburn's agreement to the proposed settlement terms. The Board of Education clearly breached its contractual responsibilities to Leon Wilburn regarding the nature of his assignments during the 1988-89 school year. In addition, the testimony of the witnesses on

> March 28, 1990 further established that Leon Wilburn had not received the letter of recommendation that he was supposed to receive in light of the prescriptions of the settlement agreement submitted to the Commissioner of Education in the instant matter.
>
> It is respectfully averred that the failure on the part of the Board of Education to comply with the specific terms of the settlement agreements memorialized between the parties, which agreements were subject to the Commissioner of Education's approval, represented a separate independent basis for the sustaining of Judge Ospenson's decision that the proffered letter of resignation was not binding on Petitioner Leon Wilburn. (Id.)

* * *

The Commissioner has conducted a thorough review of the record in this matter and agrees with the conclusion of the Administrative Law Judge that petitioner's resignation was not tendered in isolation or independently of mutual obligations integral to the settlement of the tenure charges. Further, he is also in complete agreement with the ALJ's conclusion that the "***resignation was not only conditional upon fulfillment of mutual obligations of the settlement agreements but more fundamentally dependent upon Commissioner approval." (emphasis supplied) (Id., at p. 7)

In the instant matter, a settlement was presented to the Commissioner for approval on October 12, 1988 which he rejected on November 23, 1988. There were precisely three terms of that settlement:

> 1. Respondent, LEON WILBURN, will agree to the forfeiture of his salary as a teaching staff member within the Teaneck School District for the period between February 23, 1988 through June 30, 1988.
>
> 2. Respondent, LEON WILBURN, will be retained by the Teaneck Board of Education for the 1988-89 academic year in a seven-tenths (7/10's) teaching capacity. His salary will reflect the withholding of his increment for the 1988-89 school year in accordance with a past resolution of the Teaneck Board of Education.
>
> 3. The Board of Education will withdraw the instant tenure charges filed against Respondent, LEON WILBURN, with prejudice. (J-1, at p. 2)

That settlement was rejected by the Commissioner on November 23, 1988 because it impermissibly set forth penalties which

only the Commissioner may levy pursuant to N.J.S.A. 18A:6-10 et seq. upon determination of truth of the tenure charges. The settlement was also rejected on the basis set forth below:

> Moreover, as implied by Item No. 2 immediately above, there has been nothing provided for consideration by either the ALJ or the Commissioner which would explain why in the face of serious tenure charges the Board should be allowed to withdraw said charges and allow respondent to resume teaching duties. In the absence of any specific information as to how or why the alleged inefficiencies triggering the filing of tenure charges are no longer deemed to be a bar to appropriate instruction, the Commissioner is unable in good conscience to sanction respondent's return to teaching duties.
>
> Accordingly, the settlement is rejected and the matter remanded to the Office of Administrative Law.
> (Commissioner's Decision of November 23, 1988, at pp. 6-7)

The settlement resulting from the remand was approved by the ALJ on March 9, 1989 and received by the Commissioner on March 13, 1989. That settlement is set forth in toto below:

> 1. The reference to the withholding of salary increment component of the Stipulation of Settlement and Dismissal relates to the fact that independently of the tenure charge proceedings initiated against Leon Wilburn, the Board determined to withhold Mr. Wilburn's employment and adjustment increments for the 1988-89 school year. This determination to withhold Mr. Wilburn's employment and adjustment increments was not the subject of any appeal to the Commissioner.
>
> 2. The reference to the 120 day salary loss reflects the mandate of N.J.S.A. 18A:6-14 and was not intended to supercede the Commissioner of Education's authorities, pursuant to N.J.S.A. 18A:6-10 to determine penalties, if any, to be assessed against a tenured school district employee who is the subject of tenure charge proceedings.
>
> 3. Leon Wilburn's assignment as a teaching staff member within the Teaneck School District for the 1988-89 school year was intended to gain the use of Mr. Wilburn's uncontroverted talents as a teacher of Art. Mr. Wilburn's evaluations as an Art teacher within the district were consistently positive and he was transferred to a

self-contained classroom instructional position when it was determined that Mr. Wilburn did not possess the appropriate endorsement to teach Art on a full-time basis.

4. The job duties and functions of Leon Wilburn, for the 1988-89 school year, will include the following:

(A) Mr. Wilburn will be assigned duties as part of the district's present review and revision of the Art curriculum within the district on a kindergarten through twelfth grade basis, which duties will include research, out-of-district review of programs in other districts, and other duties assigned by the appropriate administrators and supervisors responsible for the Art curriculum revision.

(B) Mr. Wilburn will be assigned to the Field School and will be given responsibilities concerning the maintenance of a "positive ambience" within the Field School in terms of maintaining the bulletin boards through the posting of student artwork and other student projects.

(C) Mr. Wilburn will be assigned to work with the district art teacher assigned to the district's alternative schools to assist the alternatives schools' students on art instructional projects. He will be assigned instructional responsibilities in this capacity.

(D) Mr. Wilburn will be assigned non-art related functions to assist Lucy Stamila, the Assistant to the Superintendent, to develop grant proposals with regard to arts related activities and to perform other duties, as assigned.

5. Mr. Wilburn's professional position for the 1988-89 school year has been structured so as to insure that he is responsible for actual Art instruction no more than ½ of his employment time within the district.

6. The Teaneck Board of Education determined that it would take between three and five days to present its case before an Administrative Law Judge if it sought to pursue the inefficiency tenure charges against Mr. Wilburn and it was anticipated that perhaps an equal number of days would be spent by Mr. Wilburn's attorney in

defense of the pending tenure charges. Including anticipated legal costs only, the cost to the district in pursuing tenure charges would have been approximately $10,000.

7. In addition to the estimated legal and related administrative costs regarding the continuation of tenure charge proceedings against Mr. Wilburn, pursuant to State statutes, Mr. Wilburn would have been paid from September 1, 1988 on, in light of the passage of 120 days since his suspension without pay and it was, therefore, anticipated that, assuming that the end result was the dismissal of Mr. Wilburn, a minimum of an additional $7,500 would have to have been expended by the Board of Education to pay the mandated salary payments to Mr. Wilburn, effective September 1, 1988.

8. A determination was made that Mr. Wilburn's years of more than satisfactory Art instruction within the district warranted giving Mr. Wilburn a [chance] to fulfill the duties assigned to him for the 1988-89 school year. It was hoped that the assignment of both Art and non-Art professional functions and duties would result in the rendering of satisfactory service by Mr. Wilburn to school children within the district.

9. In consideration of the Cardonick standards, it was anticipated that, if Mr. Wilburn was paid approximately $24,000, which will be his salary on a 7/10's basis for the 1988-89 school year, as a part of a buy-out/severance agreement, this amount would have been approved by the Commissioner of Education, in consideration of prior settlements that have been approved by the Commissioner of Education, in consideration of the Cardonick standards. It was, therefore, anticipated that the expenditure of this amount of money concerning the 1988-89 school year for the actual performance of assigned professional duties by Mr. Wilburn would certainly satisfy all of the Cardonick standards and would provide an additional opportunity to Mr. Wilburn to satisfy district norms concerning his professional performance.

10. As of the end of February, 1989, Mr. Wilburn will have received a total of $14,589 for services actually rendered in a professional instructional capacity to the Teaneck Board of Education. If the instant settlement agreement is not accepted by the Commissioner of Education, all of the parties involved would be severely prejudiced inasmuch as the Board would have to go

through the time and extraordinary expense of proceeding with the pending tenure charges, after having already paid Mr. Wilburn for his services rendered during the 1988-89 school year. Mr. Wilburn would also be denied an opportunity to satisfy district norms and standards concerning the rendering of professional services within the district.

11. It should be noted that Mr. Wilburn's performance concerning the duties assigned to him for the first six months of the 1988-89 school year has been satisfactory and he has completed all of his required responsibilities in his present instructional position.
(Exhibit J-3, Decision on Remand, at pp. 3a-3e)

The Commissioner rejected the settlement on April 25, 1989 because it called for petitioner to be assigned instructional responsibilities in the district's alternate schools. His elementary endorsement did not authorize his teaching of art at the secondary level. Such endorsement authorizes one to teach art in grades K-8 for less than half time. (emphasis supplied)

The settlement was also rejected on the following basis:

***review of the settlement terms does not inform the Commissioner as to what assignment respondent will have beyond the end of the 1988-89 school year. Is it anticipated that he will secure an art endorsement? Will he continue to have a "special" assignment carved out for him in an area where he is uncertified? If the latter is contemplated, the Commissioner must express his scepticism that all the noninstructional "duties" which appear to comprise much of his salaried time (1) do not require an instructional certificate, i.e., serving as an instructional aide or (2) are only appropriate for a staff member possessing the special subject endorsement of art, i.e., responsibilities in curriculum revision in art; review of art programs in other districts.

Accordingly, the settlement is remanded for modification of its terms so that the concerns expressed above are resolved sufficiently to secure approval of the settlement. Perpetuation of service in assignments for which respondent does not possess an appropriate endorsement will not be approved, nor should he be assigned responsibilities that do not require an instructional certificate at all. In the event the parties are unable to reach an acceptable settlement, this matter is to proceed to a decision on the merits.
(Commissioner's Decision of April 25, 1989, at pp. 4-5)

Upon receipt of Mr. Wilburn's May 30, 1989 letter to the Board (Exhibit J-5) and the Petition of Appeal on June 30, 1989, the Commissioner became aware that there may have been a settlement term reached between the parties that neither the ALJ nor he had reviewed. As may be seen above, neither of the two rejected settlements included a provision for resignation. In fact, one of the very reasons for rejection of the second settlement was due to its failure to stipulate what Mr. Wilburn's assignment was beyond the 1988-89 school year. For that reason, when the instant matter was transmitted to the Office of Administrative Law, consolidation with the tenure charge matter was recommended. It was further directed that the ALJ should ascertain if Mr. Wilburn's resignation was a settlement term not provided to the ALJ and Commissioner for review and approval as required by law.

N.J.A.C. 1:1-19.1(a) requires that "[w]hen the parties to a case wish to settle the matter, the judge shall require the parties to disclose the full settlement terms." (emphasis supplied) N.J.A.C. 1:1-19.1(b) further requires, inter alia, that the ALJ shall issue an initial decision incorporating and approving the full settlement terms.

Moreover, it was made abundantly clear by the State Board in Cardonick, supra, that in tenure charge matters the Commissioner may not be preempted from review of any terms of a settlement of those charges.

> The Commissioner's exclusive authority to decide [tenure] cases necessarily entails the determination of any and all matters pertinent thereto in order to make a complete disposition of the case. It is proper therefore, for the Commissioner to review and evaluate, and to approve and disapprove, tenure settlements. We believe that settlement agreements totally preempting the Commissioner from review and evaluation are against the public policy of this State as exemplified in the Tenure Employees Hearing Law. (emphasis supplied)
>
> (Slip Opinion, at p. 4)

It was therefore a matter of serious concern to find in the record that a settlement had been drawn up and agreed to by the parties (Exhibit J-2) prior to the Commissioner's November 1988 rejection of the settlement which had been submitted to him for approval. Exhibit J-2 was in existence as early as August 1988 and yet it was not submitted to the Commissioner for his review and approval as required by law. The settlement document bears the docket number for the tenure matter (OAL DKT# EDU 2971-88; Agency DKT# 45-3/88) and acknowledges that the terms contained therein are in addition to those submitted to the ALJ. The specific terms read:

> 1. The Board of Education will not oppose a request for additional, appropriate unemployment insurance benefits that may be owed to LEON WILBURN for the time period between February 23, 1988 and June 30, 1988.

2. The job duties and functions of LEON WILBURN, for the 1988-89 school year will include the following:

a) Mr. Wilburn will be assigned duties as part of the District's present review and revision of the Art curriculum within the District on a Kindergarten through Twelfth grade basis, which duties will include research, out-of-district review of programs in other districts, and other duties assigned by the appropriate administrators and supervisors responsible for the Art curriculum revision.

b) Mr. Wilburn will be assigned to the Field School and will be given responsibilities concerning the maintenance of a "positive ambience" within the Field School in terms of maintaining the bulletin boards through the posting of student art work and other student projects.

c) Mr. Wilburn will be assigned to work with the district art teacher assigned to the District's Alternative Schools to assist the Alternative Schools' students on art instructional projects.

d) Mr. Wilburn will be assigned non-art related functions to assist Lucy Stamila, the Assistant to the Superintendent to develop grant proposals with regard to arts related activities and to perform other duties as assigned.

3. LEON WILBURN will be assigned a regular morning schedule, e.g., 8:00 a.m. to 12:00 noon or 8:30 a.m. to 12:30 p.m., which schedule will be worked out cooperatively with the administration.

4. LEON WILBURN'S salary on a 7/10's basis will be $24,315.90, which is based on the board's statement that LEON WILBURN's full-time salary for the 1988-89 school year would have been $34,737.00.

5. LEON WILBURN will be eligible for all fringe benefits provided to full-time teaching staff members, however, it is understood that, consistent with district practices, he will only receive reimbursement at a 7/10's rate regarding tuition reimbursement matters.

6. LEON WILBURN agrees to enroll in an appropriate matriculating program which will

qualify him for the receipt of an endorsement as an elementary and/or secondary art teacher.

7. LEON WILBURN will forthwith submit a Letter of Resignation, to be effective June 30, 1989, a copy of which is attached hereto.

8. A positive Letter of Recommendation will be prepared by District Administrators provided that LEON WILBURN shall satisfactory complete his assigned duties for the 1988-89 school year, which Letter of Recommendation will refer to LEON WILBURN'S positive accomplishments as an art teacher within the District and as a teacher employed within the District during the 1988-89 school year.

9. LEON WILBURN will be offered the appropriate COBRA health insurance benefits at the end of the 1988-89 school year.

10. Every effort will be made by the parties not to comment with regard to the settlement of the pending tenure charges. (Exhibit J-2)

Petitioner describes the above settlement as a legal document he executed in August 1988 which "***was intended to establish contractual obligations between the Board of Education and myself concerning the implementation of the settlement agreement arrived at between the parties [J-1] which was subsequently rejected by the Commissioner***." (Wilburn Affidavit, at p. 2)

These are, however, terms that should have been by law submitted to the Commissioner for review and approval. One need only to contrast the three terms of the first rejected settlement (J-1) with J-2 above to realize that the Commissioner was improperly deprived of full disclosure of terms of the settlement of the tenure charges. This failure of full disclosure has already resulted in two remands because the Commissioner was deprived of necessary specifics as to what the complete ramifications of allowing the withdrawal of tenure charges might be.

Despite the Board's clamorous arguments otherwise, petitioner's resignation was a condition of the settlement of the tenure charges. The term calling for resignation was contained within a document intended as part of the settlement to the tenure charges. However, since the terms of J-2 were not submitted to the Commissioner for his review and approval by the ALJ in the tenure matter pursuant to N.J.A.C. 1:1-19.(a), (b) and Cardonick, supra, those terms, including the one calling for petitioner's resignation are ultra vires and without force just as resignation and payment of $24,873 were so declared in Cardonick, because the resignation and payment were effectuated prior to the approval of the Commissioner.

Notwithstanding the parties characterization of J-C as (1) an "implementation" of the agreement submitted to the

Commissioner, (2) being "contractual" in nature and (3) having terms "additional" to the settlement submitted to the Commissioner, he finds such euphemisms pure and simple obfuscation to mask the fact that they engaged in settlement terms deliberately withheld from the Commissioner in settlements he was presented to review in two initial decisions. (J-1 and J-3) In so concluding, the Commissioner finds such actions entirely unconscionable and deserving of the most severe chastisement.

Accordingly, petitioner's letter of resignation and the Board's acceptance thereof are of no effect. Petitioner retains his tenure rights as a teaching staff member until a final determination in the tenure charge matter is reached by the Commissioner. He is likewise entitled to whatever salary and emoluments are afforded him under the Tenured Employees Hearing Act during the pendency of a final decision of the Commissioner.

Given the grave concerns raised by the improper settlement engaged in by the parties in this matter, it is ordered that the Commissioner's decision in this matter be forwarded to the Office of Administrative Law for review and consideration by the Administrative Law Judge presiding over the tenure matter with which the Commissioner had originally recommended consolidation when transmitting the instant matter.

Finally, the Commissioner adopts as his own the conclusions of the ALJ that this matter is not time barred pursuant to N.J.A.C. 6:24-1.2(b) for the reasons expressed in the initial decision.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 6189-89
AGENCY DKT. NO. 248-8/89

IN THE MATTER OF THE TENURE HEARING OF
APRIL RENEE' BRADLEY,
BOARD OF EDUCATION OF THE CITY OF NEWARK

Carolyn Ryan-Reed, Esq., for petitioner
(Associate Counsel for the Board)

Irving C. Evers, Esq., for respondent
(Giblin & Giblin, attorneys)

Record Closed: December 19, 1989 Decided: January 23, 1990

BEFORE **WARD R. YOUNG,** ALJ:

April Renee' Bradley, a tenured teaching staff member employed by the Newark Board of Education (Board), was suspended without pay on July 25, 1989, upon certification of tenure charges by the Board for incompetency and/or unbecoming conduct. Bradley denies the truth of the charges and seeks dismissal of those in Count One on the ground they represent inefficiencies and she was not provided the 90-day notice for correction pursuant to N.J.S.A. 18A:6-11.

The matter was transmitted to the Office of Administrative Law as a contested case on August 17, 1989 pursuant to N.J.S.A. 52:14F-1 et seq., was preheard on October 5, 1989, and proceeded to plenary hearing on December 14, 15, 18 and 19, 1989. The record closed upon termination of the fourth day of hearing, December 19 with no compelling reason for the undersigned to direct the filing of post-hearing briefs and no request from either party to be permitted to do so.

MOTIONS TO DISMISS

Respondent Bradley filed a motion to dismiss all charges in Count One prior to the first day of hearing due to the Board's alleged failure to comply with N.J.S.A. 18A:6-11 and provide a 90-day correction period. Bradley contends said charges should be deemed inefficiencies rather than incompetencies. Upon closure of the Board's case on the fourth day of hearing, Bradley made oral application to dismiss charges 5 a, b, c and d in Count Two on the ground the Board had not met its burden of proof by a preponderance of credible evidence as to the truth of those charges.

A bench ruling on both motions by the undersigned neither granted nor denied either motion, but rather held them in abeyance until a careful and thorough review was made of the total record. Each motion shall be addressed as the result of such a review and the adoption of factual findings.

TESTIMONIAL AND DOCUMENTARY EVIDENCE

Each charge will be addressed in order with a recitation of evidence deemed to be relevant. Factual findings shall be incorporated under each charge following the recitation in order to avoid fragmentation.

FIRST COUNT

3. FOR THE PAST SEVERAL YEARS OF APRIL BRADLEY'S EMPLOYMENT, SHE HAS BEEN INCOMPETENT IN THE PERFORMANCE OF HER ASSIGNED TEACHING DUTIES THEREBY RESULTING IN A WHOLESALE DISRUPTION OF THE ORDERLY PROCESS AND ADMINISTRATION OF THE SCHOOLS TO WHICH SHE HAS BEEN AND IS ASSIGNED.

4. APRIL BRADLEY HAS FAILED TO CREATE AND MAINTAIN A PROPER CLASSROOM ENVIRONMENT AS MANIFESTED BY A CAPABLE MANAGEMENT OF THE CLASSES TO WHICH SHE HAS BEEN ASSIGNED, IN THAT:

   A. SHE DOES NOT MAINTAIN A NEAT, ATTRACTIVE CLASSROOM.

   B. SHE DOES NOT POST THE RULES AND PROCEDURES GOVERNING CLASSROOM CONDUCT THEREBY LEADING TO A PRESUMPTION THAT NO SUCH RULES EXIST.

   C. SHE DOES NOT MAINTAIN APPROPRIATE "CENTERS OF INTEREST."

   D. SHE DOES NOT MAINTAIN PROPER CLASSROOM MANAGEMENT AND DISCIPLINE TECHNIQUES.

   E. SHE HAS NOT IDENTIFIED AND CORRECTED BEHAVIORAL PROBLEMS OF THE STUDENTS.

The Board relies predominantly on the testimonial evidence of five separate evaluators and their observation reports to meet its burden of proof as to the truth of the above charges. Its principal witness was Zelma Collins, the Clinton Avenue School principal with 16 years of experience as a principal, other administrative experience, and 18 years of experience as a teacher. Bradley came under the supervisory jurisdiction of Collins in September 1986.

Collins testified that the performance of Bradley as a kindergarten teacher in 1986-87 was borderline, and she was reassigned to grade 3 in 1987-88. The earliest unsatisfactory observation report in evidence is that of December 1, 1987, which was executed by Collins following a 50-minute observation. See, P-4. The assessments incorporated therein were 4 satisfactory, 1 marginal, and 16 unsatisfactory. Collins stated

that Bradley refused to sign the document and refused to accept it. The document was transmitted to Bradley with a covering memo under date of December 9, 1987 (also incorporated in P-4). It is noted that, notwithstanding the 50-minute time period from 1:55 to 2:45 indicated on the face of the report, Collins indicated in additional comments on page 2: "I must return to adequately observe and evaluate your needs and the class needs. Thirty minutes is not enough!" This discrepancy was not explained on the record.

Collins noted the lack of organization of Bradley's classroom and her desk. She also noted that centers of interest were not established, and made several comments in her report of the impropriety of Bradley's classroom management and discipline techniques as well as Bradley's failure to maintain control of her class.

It appears to be a normal procedure in Newark for principals to request other principals to come into their schools to observe and evaluate teachers as the result of an unsatisfactory evaluation by the supervising "home" principal. This process is presumably in the interest of objectivity, fairness, and an effort to provide assistance to the teacher, and not to re-enforce negative assesments although that may be a result. Four administrators not assigned to the Clinton Avenue School were requested to observe Bradley, and these four testified at the hearing.

Anzella K. Nelms observed Bradley on January 12, 1988 for 1 hour and 15 minutes. Her report, P-26 in evidence, records 4 satisfactory and 17 unsatisfactory areas with no rating for one area. The negative areas were: failure to maintain a neat and attractive classroom (with rules and procedures posted); failure to maintain centers of interest; and poor pupil-teacher relations and classroom control. Nelms testified as to pupil inattentiveness, poor planning, and a classroom environment not conducive to effective learning. She further stated that Bradley refused to sign the report.

Nelms stated on cross-examination that Assistant Executive Superintendent Vivian K. Lampkin advised her that Bradley was in need of assistance. Nelms also elaborated on the incompleteness of Bradley's lesson plans and failure to follow them, and also an inordinate number of disciplinary interruptions during the instructionalprocess. In response

to an inquiry from the undersigned, Nelms expressed doubts for Bradley's improved performance and a belief that there is no hope for same.

Principal Frank H. Walters, Jr., from the Bergen Street school testified about his March 24, 1988 observation of Bradley. His report, P-27 in evidence, records 5 satisfactory, 13 unsatisfactory, and 4 borderline assessments. His unannounced visit began at 10:00 a.m. and lasted for 45 minutes. He stated that the classroom environment was chaotic due to a lack of teacher control and that Bradley was not involved in instruction. Bradley assembled a reading group and proceeded with a lesson which was scheduled for 9:00 a.m. according to the lesson plans. The summary and suggestions for improvement by Walters, attached to the report, as well as the testimonial evidence adduced, established dissatisfaction with Bradley's teaching performance and control of her class.

Walters stated on cross-examination that Collins only expressed a concern about Bradley's performance when he was requested by her to make an "outside" observation and evaluation.

Collins also observed Bradley on February 28, 1989 and recorded 5 satisfactory and 16 unsatisfactory assessments on her report, which is P-20 in evidence. Her assessments were negative in the areas of classroom tidiness, centers of interest, posted rules and procedures, classroom management and disciplinary techniques. Bradley again refused to sign the observation report.

Blanche L. Bishop, principal at the Warren Street School, observed Bradley on March 14, 1989 at the request of supervisor Ruth Hazelwood. Her assessments recorded in her observation report, P-40 in evidence, indicate 2 satisfactory and 20 unsatisfactory checks. The one satisfactory of note concerns the maintenance of centers of interest, which had been previously deemed unsatisfactory by other observers.

Bishop elaborated on her almost totally negative assessment of Bradley in testimony adduced on cross-examination and stated that Bradley does not appear to have the ability to control her class, and she expressed serious doubt that Bradley could improve her performance because of such poor relations with her pupils.

Joseph Maccia, principal at the Ann Street School, testified that he observed Bradley on April 25, 1989 at the request of Collins. His report, P-28 in evidence, incorporated 4 satisfactory and 18 unsatisfactory assessments. None of the satisfactory checks relate to the charges herein. He stated that Bradley had no control of her class and there was no discernable classroom organization. Her attempt to teach lacked the elements of good teaching, he said, as he observed no pupil preparation for learning, no knowledge conveyed, no questions prepared, and that Bradley was oblivious to the negative behavior and inattentiveness of her pupils.

Maccia indicated on cross-examination that Collins did not convey any background on Bradley to him when she requested his assistance other than the fact that negative assessments existed.

Bradley testified she did not receive copies of any of the observation reports referred to in this recitation, namely P-4 and P-20 (Collins), P-26 (Nelms), P-27 (Walters), P-28 (Maccia), and P-40 (Bishop). She further stated that she never refused to sign any of the reports and she did not meet with Walters or Bishop in post-observation conferences, but did confer with Nelms and Maccia as well as Collins.

I **FIND** that the Board has met its burden of proof by a preponderance of credible evidence that the charges incorporated in 4 "a" through "e" above are **TRUE.** Findings related to Charge 3 will be addressed later in this decision.

5. DESPITE NUMEROUS SUGGESTIONS AND ADMONITIONS, APRIL BRADLEY HAS FAILED TO RECTIFY THE INEFFICIENCIES RELATING TO PROPER CLASSROOM ENVIRONMENT THEREBY GIVING RISE TO A PRESUMPTION THAT SHE LACKS THE NECESSARY ABILITY, SKILL OR MOTIVATION TO EFFECT THE NECESSARY CHANGE.

Notwithstanding the pending motion to dismiss the charges in Count One, which requires that a distinction be made to characterize those charges as inefficiencies or

incapacity, and a careful review of the complete observation reports and attachments relative to the Bradley classroom environment and the testimony adduced from evaluators and addressed above in Charge No. 4, I **FIND** that the Board has met its burden of proof by a preponderance of credible evidence that Bradley has failed to rectify the shortcomings highlighted in this record, and I determine those portions of the charge to be **TRUE.** The presumption referred to in the latter portion of this charge will be addressed later in this decision.

6. ALSO, APRIL BRADLEY HAS FAILED TO DEMONSTRATE THE PROPER TEACHING CHARACTERISTICS EXPECTED OF TEACHING STAFF MEMBERS IN THAT:

   A. SHE DOES NOT DEMONSTRATE A WHOLESOME RAPPORT WITH STUDENTS COMMITTED TO HER CHARGE.

   B. SHE DOES NOT DEMONSTRATE A SYMPATHETIC UNDERSTANDING OF THE FEELINGS AND NEEDS OF THE STUDENTS.

There is no compelling need to repeat the extensive testimony adduced from the five administrators who independently observed and evaluated Bradley. The observation reports in evidence (P-4, P-20, P-26, P-27, P-28 and P-40) also establish that the relations that existed between Bradley and her pupils were considerably less than what could and should be reasonably expected.

Pupil T. L. was transferred from Bradley's class on February 11, 1988 because of alleged corporal punishment. The matter was referred to the Division of Youth and Family Services (DYFS) for investigation as a matter of law. The investigative report by DYFS was not made available in this record because of the confidentiality afforded to it, also as a matter of law. See, P-8 and P-9. Pupil T.L. did testify however.

T. L. testified that Bradley hit him with a yardstick when he left his seat with her permission, to get paper. During this process, while T. L. was picking up a book that belonged on a shelf, the alleged incident occurred.

Bradley denied the incident occurred and stated she did not have a yardstick in her classroom.

No finding can be made here as to whether Bradley was guilty of corporal punishment. Notwithstanding that T. L. testified that he was not a model pupil (having been transferred into Bradley's class because of his bad conduct in a previous class), it is nevertheless not difficult to determine that the relationship between teacher and pupil was not good.

Principal Collins testified about other alleged incidents with pupils F.B. and T.R., again denied by Bradley. See, P-14 and P-21. Collins also testified of teacher complaints of excessive noise emanating from Bradley's classroom. See, P-12. The observation reports are replete with references to Bradley's lack of control over her pupils.

The preponderance of credible evidence requires a determination that Charges 6a and 6b are **TRUE. I SO FIND.**

7. MOREOVER, APRIL BRADLEY HAS FAILED TO UTILIZE AND IMPLEMENT PROPER AND EFFECTIVE TEACHING TECHNIQUES, IN THAT:

   A. SHE HAS FAILED TO PREPARE AND COMPLETE USEFUL LESSON PLANS.

   B. SHE HAS FAILED TO SELECT OBJECTIVES WHICH ARE APPROPRIATE TO THE SUBJECT MATTER AND LEARNERS.

C. SHE HAS EITHER FAILED TO STATE OBJECTIVES OR FAILED TO STATE OBJECTIVES IN A MANNER UNDERSTANDABLE TO THE LEARNER.

D. SHE DOES NOT PROVIDE FOR ACTIVITIES WHICH ARE DESIGNED TO DEVELOP CRITICAL THINKING, RESOURCEFULNESS OR CREATIVITY.

E. SHE DOES NOT PROVIDE FOR ACTIVITIES WHICH ARE DESIGNED TO ENCOURAGE POSITIVE STUDENT LEADERSHIP AND RESPONSIBILITY.

F. SHE DOES NOT PROVIDE FOR DIFFERENCES IN VARIOUS STUDENT'S ABILITIES.

G. SHE DOES NOT USE MOTIVATIONAL TECHNIQUES APPROPRIATE TO THE LEARNER AND OBJECTIVES.

H. SHE DOES NOT UTILIZE VARIED AND APPROPRIATE LEVELS OF QUESTIONING.

I. SHE DOES NOT MAKE PROVISIONS FOR ANALYZING, EVALUATING, AND REVIEWING LESSONS.

J. SHE DOES NOT USE THE RESULTS OF LESSON ASSESSMENTS IN PLANNING.

K. SHE DOES NOT USE A VARIETY OF PRINT, NON-PRINT, CONCRETE INSTRUCTIONAL MATERIAL AND THE HUMAN RESOURCES OF THE SCHOOL AND COMMUNITY.

The Board relies on the testimony of the five administrators who observed and evaluated Bradley as well as the observation reports in evidence. See, P-4, P-20, P-26, P-27, P-28 and P-40.

I again find no compelling reason to be redundant. I do find the demeanor of the administrators during direct and cross-examination to be such that credence is given to both their testimony and observation reports.

I therefore **FIND** charges 7a through 7k to be **TRUE.**

8. APRIL BRADLEY HAS BEEN MADE AWARE OF THE ABOVE-MENTIONED DEFICIENCIES AS SET FORTH IN WRITTEN TEACHER OBSERVATION REPORTS AND POST OBSERVATION CONFERENCES. MOREOVER, APRIL BRADLEY HAS BEEN ALERTED TO SEVERAL TECHNIQUES WHICH WOULD CORRECT THE ABOVE DEFICIENCIES.

Notwithstanding that the statements incorporated in Charge 8 are determined herein to be true, I nevertheless do not find such statements to constitute a charge. Charge 8 is therefore **DISMISSED.**

9. DESPITE APRIL BRADLEY'S KNOWLEDGE OF THE CORRECTIVE TECHNIQUES (AS OUTLINED IN THE ATTACHED EXHIBITS), SHE HAS EITHER REFUSED OR HAS BEEN UNABLE TO CORRECT THE ABOVE DEFICIENCIES.

The Board again relies on the observation reports and testimony of the five administrators addressed previously.

Although each of the administrators testified that Bradley refused to sign the observation reports, Bradley contends she never received copies of any but did have discussions with Collins and Maccia concerning P-20 and P-28 respectively. Bradley also stated she received the attachments to P-26 from Nelms.

The credibility of Bradley and the agents of the Board is at issue here.

Considerable correspondence was sent to Bradley by various agents of the Board. Some were sent to her at the Clinton Avenue School, and others mailed to her at her home address. Some of the latter were sent by both regular and certified mail. Bradley denies having ever received P-31, P-32, P-33 attachment, P-34 attachment, P-38, or P-39. It is noted that Bradley appeared on the first day of hearing at the Office of Administrative Law after notice had been sent to the same home address.

Bradley contends she does not believe that any of the documents were ever sent to her or prepared until "after the fact." It is presumed here that the latter testimony meant they were prepared after the certification of charges.

I do not believe Bradley. **I FIND** that Bradley knew of the administrative concerns of her teaching effectiveness, she repudiated administrative efforts to assist her, and that the preponderance of credible evidence supports the Board's contention that her teaching performance had not improved. I therefore **FIND** Charge No. 9 to be **TRUE.**

10. THE BOARD HAS SOUGHT TO ADDRESS MS. BRADLEY'S DEFICIENT CONDUCT BUT SUCH ASSISTANCE AND GUIDANCE AS HAS BEEN PROVIDED HAS BEEN INADEQUATE IN THE FACE OF MS. BRADLEY'S WHOLESALE DEFICIENCIES.

I **FIND** Charge No. 10 to be a statement rather than a charge. It is therefore **DISMISSED.**

11. APRIL BRADLEY'S DEFICIENCIES HAVE SUBSTANTIALLY DIMINISHED THE ABILITY OF THE BOARD OF EDUCATION OF THE CITY OF NEWARK TO DELIVER A THOROUGH AND EFFICIENT EDUCATION TO THE PUPILS ASSIGNED TO APRIL BRADLEY'S CLASSROOM(S), IN THAT:

A. SUCH CONDUCT HAS DISRUPTED THE CONTINUITY OF THE EDUCATIONAL PROGRAM IN MS. BRADLEY'S CLASSROOMS.

B. SUCH CONDUCT HAS EFFECTIVELY DEPRIVED THE CHILDREN COMMITTED TO MS. BRADLEY'S CHARGE OF VALUABLE INSTRUCTIONAL TIME TO WHICH THEY ARE ENTITLED.

C. SUCH CONDUCT CREATES AND LEAVES A POOR EXAMPLE FOR THE STUDENTS COMMITTED TO MS. BRADLEY'S CHARGE.

D. SUCH CONDUCT LEAVES THE CHILDREN COMMITTED TO APRIL BRADLEY'S CHARGE WITH THE IMPRESSION THAT DILIGENT, EFFECTIVE AND EFFICIENT SERVICE IS NOT THE HALLMARK OF PUBLIC SERVICE.

The charges incorporated herein must be deemed to be speculative in the absence of sufficient credible evidence to support them. Although it is probable that Bradley's lack of control and poor classroom management has resulted in a loss of instructional time with disruptions in the continuity of the educational program, I must **FIND** that the standard of a preponderance of credible evidence has not been met. I further **FIND** no evidence to support the Board's charges related to pupil impressions resulting from Bradley's conduct. It must therefore be determined that the charges are **UNTRUE**, and are therefore **DISMISSED.**

12. APRIL BRADLEY'S DEFICIENCIES HAVE ESTABLISHED A POOR PRECEDENT FOR THE CHILDREN COMMITTED TO HER CHARGE AS WELL AS OTHER TEACHING STAFF EMPLOYEES OF THE DISTRICT.

I **FIND** this to be a conclusory statement by the Board and deem it not to be a charge. It is therefore **DISMISSED.**

13. ADDITIONALLY, APRIL BRADLEY HAS CREATED PROBLEMS WITH VARIOUS PARENTS AND CAUSED SAID PARENTS TO DEMAND THAT THEIR CHILDREN BE REMOVED FROM APRIL BRADLEY'S CLASSES.

Principal Collins testified that she received three or four parental requests for the transfer of their children from Bradley's class. P-8, P-9, P-13 and P-21 also document this charge. Bradley did not dispute this charge.

I **FIND** this charge to be **TRUE.**

14. MOREOVER, APRIL BRADLEY CAUSED SEVERE MORALE PROBLEMS AT THE SCHOOLS TO WHICH SHE HAS BEEN ASSIGNED AND HAS CAUSED THE ADMINISTRATION TO CONSUME AN INORDINATE AMOUNT OF TIME SEEKING TO CORRECT HER DEFICIENCIES.

The portion of this charge relating to morale problems must be deemed to be speculative in the absence of credible evidence to support same. It is therefore **DISMISSED.**

The abundance of administrative time devoted to concerns of Bradley's performance as a teacher is well documented in most of the 40 exhibits admitted into evidence. I **FIND** that portion of the charge to be **TRUE.** I therefore determine that Charge No. 14 in its entirety is **PARTIALLY TRUE.**

15. THE SINGULAR AND CUMULATIVE EFFECT OF MARY JACKSON'S [SIC] DEFICIENCIES SUPPORT A DEMAND FOR HER DISMISSAL AS A TEACHER FROM THIS SCHOOL DISTRICT AS EVIDENCED BY THE FACT THAT, OVER A FIFTEEN (15) MONTH PERIOD, APRIL BRADLEY HAS RECEIVED "UNSATISFACTORY" OBSERVATION REPORTS IN EXCESS OF SOME FIVE (5) DIFFERENT OCCASIONS. THIS IS FAR IN EXCESS OF THE STANDARDS OF REASONABLE EXPECTATIONS FOR TEACHING STAFF MEMBERS.

There is an obvious typographical error incorporated herein. It can only be presumed the error resulted from a reference made to charges certified by the Board, filed with the Commissioner, and transmitted to the OAL where it was docketed as EDU 1859-86 (Agy Dkt. #4-2/86). Nevertheless, it must be deemed not to be a charge, but

rather a conclusory statement demanding Bradley's dismissal because of unsatisfactory evaluations. It must therefore be **DISMISSED.**

16. ALTHOUGH APRIL BRADLEY'S INCREMENT WAS WITHHELD DUE TO HER UNSATISFACTORY PERFORMANCE, HER DEFICIENCIES HAVE NOT IMPROVED.

Bradley denies that her increment was ever withheld. Recommendations for the withholding of Bradley's increment are verified in evidentiary documents P-30, P-37, P-38, and P-39, but there is no credible evidence in the record that the Board acted to withhold it. The Board has therefore not met its burden that that portion of the charge is true. The lack of improvement in Bradley's performance has been established by the credible evidence and evaluative documents previously addressed. I therefore **FIND** this charge to be **PARTIALLY TRUE.**

17. APRIL BRADLEY'S INCAPACITIES BESPEAK OF THE NEED TO DISMISS HER AS A TEACHER IN THE SCHOOL DISTRICT, FOR TO DO OTHERWISE COULD BE PERCEIVED AS THE BOARD'S CONDONATION OF HER UNPROFESSIONAL AND OTHERWISE INEFFICIENT CONDUCT.

This charge, similar to charges 8, 10, 12 and 15, is deemed not to be a charge, but rather an argument in support of the Board's demand for Bradley's dismissal. It is therefore **DISMISSED** without any finding related to incapacity and "unprofessional and otherwise inefficient conduct."

SECOND COUNT

5. MS. JACKSON [SIC] HAS ENGAGED IN THE USE OF CORPORAL PUNISHMENT IN DISCIPLINING HER STUDENTS, IN THAT:

a. ON FEBRUARY 10, 1988, AN INCIDENT REPORT WAS FILED IN WHICH MS. BRADLEY HIT A STUDENT WITH A STICK.

b. ON MAY 5, 1988, THE NEWARK BOARD OF EDUCATION RECEIVED A CALL FROM PARENT, A.L., STATING THAT MS. BRADLEY WAS HITTING HER CHILD F. B. AND OTHER STUDENTS WITH A HANDBROOM. SAID INCIDENT WAS INVESTIGATED BY THE DIVISION OF YOUTH AND FAMILY SERVICES.

c. ON FEBRUARY 17, 1988, A STUDENT, T. L., REPORTED THAT APRIL BRADLEY STRUCK HIM ON THE BACK WITH A POINTER. BASED UPON THE DIVISION OF YOUTH AND FAMILY SERVICE'S INVESTIGATION, PHYSICAL ABUSE WAS SUBSTANTIATED.

d. ON MARCH , 1989, AN INCIDENT REPORT WAS FILED WITH THE NEWARK BOARD OF EDUCATION REPORTING AN INCIDENT INVOLVING MS. BRADLEY'S HITTING A STUDENT, T. R. SAID INCIDENT WAS REPORTED TO THE DIVISION OF YOUTH AND FAMILY SERVICES.

a. Although the pupil is not identified, it is clearly established the pupil is T. L. T. L. testified that Bradley hit him with a yardstick, and the yardstick broke. On cross-examination, T.L. stated he left his seat, with Bradley's permission, to get some paper. During this process, he said he picked up a book that belonged on a shelf and Bradley hit him. He then stated he left the classroom and went to the Principal, who brought him to the nurse, who then applied red stuff and a band aid.

The report of this incident was recorded by Collins and is in evidence (P-9). This report states that T. L. alleged "That Ms. Bradley came into the classroom when another boy and he were having a confrontation and struck him."

Bradley denied inflicting any corporal punishment on T. L.

I **FIND** the Board has not substantiated the truth of this charge by a preponderance of credible evidence. It is therefore **DISMISSED.**

b. I **FIND** the record only incorporates the allegation of this charge but lacks credible evidence to substantiate it. It is therefore **DISMISSED.**

c. This is the same pupil identified in a but the alleged incident herein supposedly occurred on February 17. Testimony which was related to the alleged February 10 incident and P-9 was adduced from Principal Collins. Collins stated she did not witness or investigate the alleged incident, but merely advised DYFS.

It is not inconceivable that the direct examination of T.L. may have brought out testimony regarding both charges (a and c). T. L. did state he had a fight with pupil C. W. on the playground after lunch, but that Bradley had hit him in the morning. He indicated the fight occurred with C. W. while Collins and his mother were in conference, but did not testify of any relationship with Bradley at this time.

The Board carries the burden of substantiating the charge. I **FIND** it has failed to do so. It is therefore **DISMISSED.**

d. This charge alleges the infliction of corporal punishment on pupil T.R. on some date in March 1989. There was no testimony nor documentary evidence submitted to substantiate this charge.

Another typographical error is noted in the reference to Ms. Jackson as occurred in Charge 15 of the First Count.

I **FIND** the Board has not met its burden of proof as to the truth of charges 5 a, b, c, and d. They are therefore **DISMISSED.**

6. MS. BRADLEY'S CONDUCT INVOLVES A BREACH OF DUTY WHICH PROFESSIONAL ETHICS ENJOIN AND WHICH CONDUCT IS

UNACCEPTABLE AND UNBECOMING TO A MEMBER OF A PROFESSION IN GOOD STANDING.

I **FIND** this to be a conclusory statement by the Board and deem it not to be a charge. It is therefore **DISMISSED.**

7. EACH OF THE ABOVE ACTIONS SINGULARLY CONSTITUTES CONDUCT UNBECOMING OF A TEACHER; HOWEVER, THE AGGREGATE OF THE ABOVE ACTS OF CORPORAL PUNISHMENT BY MS. BRADLEY EVIDENCES GROSS AND HARMFUL CONDUCT UNBECOMING OF A TEACHER TOWARDS PUPILS OF A TENDER AGE.

I **FIND** this to be an argument by the Board in support of its demand for the dismissal of Bradley based on the truthfulness of other certified charges. It is deemed not to be a charge standing alone and is therefore **DISMISSED.**

8. APRIL BRADLEY'S CONSISTENT USE OF CORPORAL PUNISHMENT, IN VIOLATION OF N.J.S.A. 18A:6-1, EVIDENCES THE NEED TO DISMISS HER AS A TEACHER IN THE SCHOOL DISTRICT; TO DO OTHERWISE COULD BE PERCEIVED AS THE BOARD'S CONDONATION OF THIS UNPROFESSIONAL AND REPREHENSIBLE CONDUCT.

I again **FIND** this to be an argument for dismissal based on the presumption that the charges of corporal punishment were true. It is therefore not deemed to be a charge and is therefore **DISMISSED.**

9. MS. BRADLEY HAS ALSO ENGAGED IN CONDUCT WHICH IS UNBECOMING OF A TEACHER OF PUPILS OF A TENDER AGE IN THAT:

   A. SHE HAS ON MANY OCCASIONS PHYSICALLY ABUSED STUDENTS.

   B. SHE HAS BEEN INSUBORDINATE, DEFYING BOARD ADMINISTRATIVE DIRECTIVES.

C. SHE HAS LACKED PROPER CLASSROOM MANAGEMENT AND CONTROL OVER HER STUDENTS.

D. SHE HAS REFUSED OR HAS BEEN UNABLE TO INCLUDE IDEAS, RECOMMENDATIONS AND STRATEGIES OFFERED HER TO REMEDY HER UNSATISFACTORY PERFORMANCE.

E. SHE HAS CAUSED SEVERE MORALE PROBLEMS AT THE SCHOOLS TO WHICH SHE HAS BEEN ASSIGNED.

F. SHE HAS WILLFULLY DISREGARDED REQUIREMENTS TO CONFORM HER CONDUCT TO THE LEVEL EXPECTED TO TEACHING STAFF MEMBERS.

a. This charge is a redundancy of charges 5a, b, c, and d, which were found not to be true. The same finding therefore applies to charge 9a. It is therefore **DISMISSED.**

b. Principal Collins testified as to many instances of Bradley's conduct demonstrating defiance, disrespect, lack of personal control of her emotions, and general disregard for policy.

Collins stated non-compliance by Bradley of the call-in, sign-in policy which triggered a February 24, 1988 memo (P-10). She further testified that Bradley left five pupils unsupervised on May 24, 1988 (P-15). Collins said that Bradley again left pupils unsupervised on February 23, 1989, which triggered another memo (P-16). Collins recorded another incident on February 25, 1989 concerning discipline being administered to Bradley's pupils in the hall by a parent volunteer. An attempt by Collins to speak with Bradley on this occasion resulted in Bradley walking "out of the room and down the hall leaving your class and informed me that I was there." See, P-17. The memo states that Bradley "slammed the door and locked it rather than engage in conversation with Ms. Washington and myself."

Collins also testified that she reviewed Bradley's pupil records as the result of Bradley transmitting form letters to parents advising of the potential non-promotion of about 13 pupils. Collins stated she found pupil records incomplete and inaccurate with test scores missing.

Collins further stated she found Bradley's classroom door locked on about three occasions in 1988-89 in violation of policy, which triggered memo P-18.

Collins also recorded an incident that allegedly occurred on February 28, 1989 during an observation she was making of Bradley's teaching performance. Collins indicated that Bradley "decided to leave the room and go to the office to tell Ms. Bostice not to take mail out of your box and give it to a student." See, P-19. The memo incorporates a suggestion made to Bradley by Collins "that you send a note so that you could go on with your lesson . . ." The memo indicates that Bradley left the room and left Collins to care for her class and stated "either you stay in my room or stay out."

Collins and all other administrators testified that Bradley refused to sign their observation reports. Evaluations are to be acknowledged by the teacher's signature, which merely signifies that the teacher read the document. This procedure is required by the negotiated agreement between the Board and Union. See, R-1, Section 10D at page 27.

Collins also testified about an April 25, 1989 incident concerning Bradley's conduct when administrator Maccia arrived to observe her. She testified that Bradley left the classroom when Collins arrived with Maccia in order to introduce them to each other. This was resolved through the intervention of Union representative Joyce Jones. See, P-24.

Bradley also testified, relative to P-16 and her unsupervised class on February 23, 1989, that she left the class to attend a workshop at another school and advised office personnel of same. Bradley also stated, relative to alleged defiance in P-17, that she "was not totally defiant . . . for well over one year." Concerning P-19, Bradley testified she did leave her class to go to the office for her plan book but had the permission of Collins to do so.

Bradley further stated, concerning P-24 and the Maccia incident, that she had a right to know when she was to be observed and evaluated in accord with the negotiated agreement and, further, that she was excused by Collins to go to the bathroom and did not "walk out". [A thorough review of the negotiated agreement did not result in any "right to know" finding]. See, R-1.

Factual findings related to this charge must result from a determination of the credibility of testimonial evidence and the contents of Collins' memoranda, as well as the observed demeanor of the witnesses. The latter mitigates against Bradley, who had to be contained on several occasions by the undersigned not to orally respond to testimony being given by the Board's witnesses. I found the responses of the latter to be believable.

I **FIND** that the Board has met its burden of proof by a preponderance of credible evidence. This charge is deemed to be **TRUE.**

c. This charge is redundant and was addressed in charge 4d of the First Count. I **FIND** it to be **TRUE.**

d. This charge was subsumed in charges 4a through e, 5, and 16 of the First Count. I **FIND** it to be **TRUE.**

e. I **FIND** no competent evidence in the record to substantiate this charge. It is therefore **DISMISSED.**

f. This charge was subsumed in charges 4a through e, 5, and 16 of the First Count. I **FIND** it to be **TRUE.**

10. TO KEEP MS. BRADLEY AS A TEACHING STAFF MEMBER WOULD IMPLY AND IN FACT REFLECT A CONDONATION BY THE BOARD OF MS. BRADLEY'S UNPROFESSIONAL AND REPREHENSIBLE CONDUCT, WHICH,

IF ALLOWED, MAY INDICATE AN ABANDONMENT BY THE BOARD OF ITS STATUTORY DUTIES AND RESPONSJBILITIES.

I **FIND** this not to be a charge but rather an argument by the Board in support of its demand for the dismissal of Bradley. It is therefore **DISMISSED.**

11. MS. BRADLEY'S CONDUCT INVOLVES A BREACH OF DUTY WHICH PROFESSIONAL ETHICS ENJOIN AND WHICH CONDUCT IS UNBECOMING TO A MEMBER OF A PROFESSION IN GOOD STANDING.

I **FIND** no compelling reason to overburden this record further with a repetition of the preceding recitation. There are ample findings herein to support a **FINDING** that this charge is **TRUE.**

12. MS. BRADLEY'S BLATANT DISREGARD OF BOARD PROCEDURES AND APPLICABLE LAWS, CREATES A POOR PRECEDENT FOR OTHER TEACHING STAFF EMPLOYEES OF THE SCHOOL DISTRICT AND SETS AN IMPERMISSIBLE EXAMPLE FOR STUDENTS IN HER CHARGE.

I **FIND** this to be a statement of a conclusion by the Board and deem it not to be a charge. It is therefore **DISMISSED.**

13. EACH OF THE ABOVE ACTIONS SINGULARLY CONSTITUTES CONDUCT UNBECOMING OF A TEACHER, AND THE AGGREGATE OF THE ABOVE MISCONDUCT BY MS. BRADLEY EVIDENCES GROSS AND HARMFUL CONDUCT UNBECOMING OF A TEACHER TOWARDS PUPILS OF A TENDER AGE.

I **FIND** this also to be a conclusory statement and deem it not to be a charge. It is therefore **DISMISSED.**

SUMMARY OF FINDINGS/CONCLUSIONS

With full recognition that charges 3 and the latter portion of 5 in the First Count have not as yet been addressed, the following is a summary of **FINDINGS** and/or **CONCLUSIONS** of all other charges:

FIRST COUNT

CHARGE	FINDING/CONCLUSION
3	Not Decided
4a	TRUE
b	TRUE
c	TRUE
d	TRUE
e	TRUE
5(first portion)	TRUE
(latter portion)	Not Decided
6a	TRUE
b	TRUE
7a	TRUE
b	TRUE
c	TRUE
d	TRUE
e	TRUE
f	TRUE
g	TRUE
h	TRUE
i	TRUE
j	TRUE
k	TRUE
8	DISMISSED
9	TRUE

CHARGE	FINDING/CONCLUSION
10	DISMISSED
11a	DISMISSED
b	DISMISSED
c	DISMISSED
d	DISMISSED
12	DISMISSED
13	TRUE
14(first portion)	DISMISSED
(latter portion)	TRUE
15	DISMISSED
16(first portion)	DISMISSED
(latter portion)	TRUE
17	DISMISSED
SECOND COUNT	
5a	DISMISSED
b	DISMISSED
c	DISMISSED
d	DISMISSED
6	DISMISSED
7	DISMISSED
8	DISMISSED
9a	DISMISSED
b	TRUE
c	TRUE
d	TRUE
e	DISMISSED
f	TRUE
10	DISMISSED
11	TRUE
12	DISMISSED
13	DISMISSED

MOTION TO DISMISS

Bradley filed a motion to dismiss all charges in the First Count, prior to the first day of hearing, due to the Board's alleged failure to comply with N.J.S.A. 18A:6-11 and provide a 90-day correction period. She contends such charges are inefficiencies rather than incompetencies.

N.J.S.A. 18A:6-11 incorporates the procedures for the filing and certification of tenure charges, and includes a provision that states "that if the charge is efficiency, prior to making its determination as to certification, the board shall provide the employee with written notice of the alleged inefficiency, specifying the nature thereto, and allow at least 90 days in which to correct and overcome the inefficiency."

The record is void of any Board written notice of any alleged inefficiencies. There is a reference by Collins in a February 25, 1989 memo that states: "I informed you that I would be in to make an evaluation and gave you 3 months to get your class in order." (P-17). I **FIND** this memo does not constitute adequate statutory compliance standing alone. Since the Board's charge in the First Count are characterized by it as incompetency (Second Count incorporates unbecoming conduct charges), but references are indeed made to inefficiencies and deficiencies in the specified charges, it only remains to be determined whether the charges are deemed to be inefficiencies or incompetencies. This is so because the record includes considerable competent evidence that demonstrates efforts of the agents of the Board to assist Bradley to overcome her shortcomings.

The Honorable Daniel B. McKeown, ALJ, distinguished between incompetency and inefficiency in East Brunswick Bd. of Ed. v. Renee Sokolow, 1982 S.L.D. 1358 at 1362:

> The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, . . ., would be a useless exercise. . . . Incompetence requires proof that the affected person regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher.

It can hardly be disputed that the environment in Bradley's classroom was not conducive to an effective teaching-learning process. Nor can it be disputed that considerable effort was put forth by Collins and others to improve that environment and Bradley's performance. Bradley did not appear to be receptive.

Principal Maccia, a most credible witness, indicates astonishment as late as April 25 in the school year when he observe no discernible classroom organization and Bradley's lack of control over her pupils.

Collins conceded the pupils in Bradley's class were difficult. The Commissioner, however, held in Metuchen Bd. of Ed. v. Leo S. Haspel, 1964 S.L.D. 17 at 27:

> . . . it is specious to seek to excuse poor discipline on the grounds that the children are less able and therefore more unmanageable. Competent teachers create a climate for learning which interests and motivates the members of the particular group being taught. Lack of discipline is the inevitable result of poor teaching whether the group be of high or low scholastic ability, and conversely, pupil self-control is a by-product of good teaching.

The Commissioner also stated in Haspel at 27:

> Poor discipline is most often rooted in poor teaching . . . . Youth who are unchallenged, bored with stereotyped and unimaginative routines which to them have little meaning and no purpose, quickly lose respect for and rebel against the person who provides such leadership.

A presumption is made that competence is associated with the acquisition of tenure after three years of probation, suspension, and evaluations. This is so notwithstanding that certified supervisors that lack the intestinal fortitude to evaluate negatively and recommend non-renewal do exist. Was Bradley competent or did she fall through the cracks? There is no speculation here and the former must be presumed. Was Bradley capable of overcoming her shortcomings? I think so.

Bradley impressed me with her articulateness and reasonable intelligence. Respondent's attitude, however, had a negative impact on me, and her poor teacher-administrative relationship that precluded positive responsiveness to suggestions designed to improve her classroom performance, did nothing to allay that impression.

A review of the charges under the First Count, however, results in a determination that the shortcomings incorporated therein could have been overcome by a reasonably intelligent teacher with a desire to do so. I therefore deem them to be inefficiencies, and due to the failure of the Board to comply with N.J.S.A. 18A:6-11, respondent's motion is **GRANTED** and those charges are **DISMISSED.**

Since it has already been determined that charges 5 a, b, c and d under the Second Count are **DISMISSED**, respondent's motion related to those charges need not be addressed.

Due to the determinations made on the motion above, I **FIND** no compelling need to address Charge 3 or the presumption in Charge 5 under the First Count.

UNBECOMING CONDUCT

Charge 9 b, c, d, f, and Charge 11 have been found to be **TRUE.**

I **FIND** that Bradley's conduct demonstrated contempt, disregard, and a lack of confidence in the professional judgment of her immediate supervisor and others who attempted to assist her. The resultant effect created an intolerable working relationship which interfered with the efficient management and operation of the Clinton Avenue School. The most significant impact unfortunately falls on children.

The Commissioner stated In the Matter of the Tenure Hearing of Joseph A. Maratea, Township of Riverside, 1966 S.L.D. 77 at 106:

> The Commissioner is assiduous to protect school personnel in their employment when they are subjected to unfair or unproper attacks or when they are unable to perform effectively because of conditions not of their own making or beyond their control. An employee is not entitled to the protection of tenure, however, when, by his own acts or failures, he creates conditions under which the proper operation of the schools is adversely affected. When the responsibility for the conditions unfavorable to the effective operation of the schools rests with the employee, then, the Commissioner holds, the protection of tenure is forfeit.

The Commissioner also said In the Matter of the Tenure Hearing of Herman B. Nash, School District of the Township of Teaneck, 1971 S.L.D. 284 at 296:

> A teacher, as any citizen, who decides to take any form of action or inaction does so at his own risk. No matter what the ultimate objective sought, the individual must accept the responsibility for his actions . . . and must accept the consequences of his actions.

I **FIND** the conduct of April Renee' Bradley warrants serious consequences, and **CONCLUDE** she shall be dismissed from her tenured teaching position.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with Saul Cooperman for consideration.

23 January 1990
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

1/29/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

JAN 29 1990
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

g/e

IN THE MATTER OF THE TENURE	:	
HEARING OF APRIL RENEE BRADLEY,	:	COMMISSIONER OF EDUCATION
SCHOOL DISTRICT OF THE CITY OF	:	DECISION
NEWARK, ESSEX COUNTY.	:	
	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. The parties' exceptions were timely filed pursuant to N.J.A.C. 1:1-18.4. However, it is noted for the record that petitioner filed primary exceptions on her own behalf and not through her attorney who, subsequent to the issuing of the initial decision and the filing of a reply to the Board's exceptions, requested to be relieved from his representation of respondent.

Three extensions of the Commissioner's time for rendering his final decision were requested in order to facilitate respondent's securing alternate counsel. On April 27, 1990 respondent was advised that unless the name of new counsel was provided by May 7, 1990, the matter would proceed based upon a review of the exceptions she developed without the advice of counsel. No notification of alternate counsel was received.

The Board excepts to the ALJ's determination to dismiss the charge of incompetency urging that the record of evaluations and testimony clearly establish respondent was incompetent. In support of this, it reiterates that portion of In re Sokolow, supra, which reads:

> The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period *** would be a useless exercise***. Incompetence requires proof that the affected person regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher. (at 1362)

The Board also cites In the Matter of the Tenure Hearing of Francis Starego, 1967 S.L.D. 271 which states that "[e]valuation of a teacher's competency is generally a matter of total impression resulting from a synthesis of observations made over a period of time." (at 272)

As to this, the Board avows that over a period of three years, respondent received eight unsatisfactory evalations, as well as an increment denial.* It also argues, inter alia, that:

> Ms. Bradley failed to call any witnesses or present any documentation to refute any of the allegations. Ms. Bradley failed to offer any defense to her poor classroom management, lack of classroom organization, lack of discipline, nor did she refute the allegation that the students had not made satisfactory progress in her class. Ms. Bradley offered no evidence to show that she used any of the suggested aids, teaching methods or techniques.
>
> Ms. Bradley was advised that her performance was unsatisfactory and given suggested strategies for improvement. There was no evidence that even minimal efforts to improve were made. Ms. Bradley offered no proof that she had improved. The Board established a prima facie case of incompetency, which Ms. Bradley failed to rebut. (Board's Exceptions, at pp. 3-4)

Respondent's reply exceptions urge affirmance of the ALJ's determination that the charges in the First Count are inefficiencies and therefore are dismissed for failure of the Board to comply with N.J.S.A. 18A:6-11. In support of this, she relies on the decision of the ALJ and a copy of an undated and unsigned set of tenure charges against a tenured teacher of the Board which is not part of the record.

The exceptions submitted by respondent herself consist of a set of twelve (12) letters to the Commissioner, as well as a number of photographs of her classroom and students and assorted documents, which are not part of the record. The exceptions comprise in essence Ms. Bradley's anecdotal and rambling rebuttal of the tenure charges. One assertion is that she never received a copy of the tenure charges. A review of the record contains the Board's proof of service of the charges on respondent. Further, the answer to the tenure charges was submitted by respondent's attorney on August 15, 1989.

A review of respondent's other exceptions reveals, inter alia, that she believes the principal, Ms. Collins, had a vendetta against her and was mean, cruel, bitter and vicious; the replacement of the Clinton School's roof during January to June 1988 made her extremely ill and her students fearful; the tenure charges are

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* It is noted that the ALJ determined on page 14 of the initial decision that there was no credible evidence to support that the Board took action on the recommendation to withhold respondent's increment.

vindictive, a conspiracy of principals friendly to Ms. Collins, and stemmed from her creativity and dedication; a board member speaking to her class on career day pulled out a gun which traumatized her and said board member's niece replaced her as a third grade teacher; there was a wire tap to obtain certain information for the tenure charges; the union representative and principal worked together against her; and she was not properly represented as no one was allowed to testify as a witness on her behalf despite giving a list of 32 witnesses to her attorney.

Upon a thorough and careful review of the record in this matter, the Commissioner reverses the ALJ's granting of respondent's motion to dismiss the charges in the First Count as they represent inefficiencies rather than incompetency. The ALJ's reasoning is set forth on pages 25-26 of the initial decision. It reads:

> A presumption is made that competence is associated with the acquisition of tenure after three years of probation, suspension, and evaluations. This is so notwithstanding that certified supervisors that lack the intestinal fortitude to evaluate negatively and recommend non-renewal do exist. Was Bradley competent or did she fall through the cracks? There is no speculation here and the former must be presumed. Was Bradley capable of overcoming her shortcomings? I think so.
>
> Bradley impressed me with her articulateness and reasonable intelligence. Respondent's attitude, however, had a negative impact on me, and her poor teacher-administrative relationship that precluded positive responsiveness to suggestions designed to improve her classroom performance, did nothing to allay that impression.
>
> A review of the charges under the First Count, however, results in a determination that the shortcomings incorporated therein could have been overcome by a reasonably intelligent teacher with a desire to do so. I therefore deem them to be inefficiencies, and due to the failure of the Board to comply with N.J.S.A. 18A:6-11, respondent's motion is GRANTED and those charges are DISMISSED.

The ALJ appears to have distinguished inefficiency from incompetency by virtue of the fact that the shortcomings exhibited by respondent could be overcome by a reasonably intelligent teacher with a desire to do so. Given that he found her articulate and reasonably intelligent, the ALJ concluded she was capable of overcoming her shortcomings; thus, the charges in the First Count constituted charges of inefficiency rather than incompetency. This, however, is not the standard for making the distinction between inefficiency and incompetency.

In the decision entitled In the Matter of the Tenure Hearing of Inez McRae, School District of Trenton, 1977 S.L.D. 572,

the standard for distinguishing between the charges of inefficiency and incompetency was addressed. It states:

> Respondent moved to dismiss Charges Nos. 2, 4, 5, 6 and 7 as charges of inefficiency because of the Board's failure to provide the required ninety day notice as provided in N.J.S.A. 18A:6-12 [now 18A:6-11]. Notwithstanding respondent's contention that inefficiencies did, in fact, exist, the hearing examiner finds that respondent demonstrated gross ineptness in performing the responsibilities of a classroom teacher. The testimony of the supervisors clearly portrays this ineptness. Whether the ineffectiveness in this case results from lack of understanding of the teaching-learning process, from lack of effort or from indifference, the hearing examiner finds that respondent failed to measure up to even minimal standards of satisfactory teaching. Respondent's lack of adequate and thorough planning demonstrated a dereliction of duty. Her lack of discipline and class control was so gross as to rise above a charge of minimal inefficiency to incompetency.*** (at 583-584)

In re Sokolow, supra, aff'd State Board 1983 S.L.D. 1645, as well as In the Matter of the Tenure Hearing of Ethel Hogue, School District of Teaneck, 1983 S.L.D. 25, aff'd State Board 40; In the Matter of the Tenure Hearing of Patricia Nafash, School District of Ridgefield Park, 1984 S.L.D. 333; In the Matter of the Tenure Hearing of Edna Booth, decided by the Commissioner May 31, 1985 aff'd State Board April 1, 1987, aff'd N.J. Superior Court, Appellate Division November 13, 1987; In the Matter of the Tenure Hearing of Delia Kind, School District of Newark, Essex County, decided by the Commissioner October 11, 1988, appeal dismissed State Board January 1, 1989, have all recited this standard which is synthesized well in In re Booth as follows:

> In the Matter of the Tenure Hearing of Patricia Nafash, Ridgefield Bd. of Ed., decided by the Commissioner March 12, 1984, summarizes well the important distinction between an incompetency charge as opposed to one of inefficiency. It reads in part:
>
> > "***The charge of incompetence, as distinguished from the charge of inefficiency, presumes that the proofs in support of the charge will demonstrate that respondent is so lacking in competency to perform the responsibilities of classroom teacher that the requirements of the 90-day improvement period, required for a charge of inefficiency, N.J.S.A. 18A:6-11, would be a useless exercise. (See, Tenure Hearing of Inez McRae, 1977 S.L.D. 572, 584.) Incompetence requires proof that the affected

> person, regardless of the assistance offered by certified supervisors, does not have the ability or capacity to be an effective teacher. School Dist. of Tp. of East Brunswick, Middlesex Cty. v. Renee Sokolow***."
> (Slip Opinion, at p. 45)

Upon a comprehensive, thorough review of the record in this matter, it is the conclusion of the Commissioner that notwithstanding any impression of reasonable intelligence and articulateness respondent may have conveyed at hearing, the totality of that record makes its quite clear that respondent demonstrated gross ineptness in performing the responsibilities of a classroom teacher despite the assistance provided to her through the evaluations of multiple individuals, not just her building principal. As in In re McRae cited above, respondent's deficiencies in planning and delivering adequate instruction were tantamount to a dereliction of duty. Moreover, her lack of discipline and class control have been demonstrated to be so gross that these deficiencies when combined with her instructional deficiencies make her overall ineptness rise above the level of inefficiency to that of incompetency. The presence of reasonable intelligence does not prevent such ineptness and ineffectiveness as a teacher from being deemed incompetency. The record herein strongly demonstrates that affording a 90-day improvement period pursuant to the filing of inefficiency charges would have been useless.

Accordingly, the Commissioner reverses that portion of the initial decision which determines that incompetency was not demonstrated by the Board. He does, however, adopt as his own the ALJ's conclusion that:

> I FIND that Bradley's conduct demonstrated contempt, disregard, and a lack of confidence in the professional judgment of her immediate supervisor and others who attempted to assist her. The resultant effect created an intolerable working relationship which interfered with the efficient management and operation of the Clinton Avenue School. The most significant impact unfortunately falls on children.
> (Initial Decision, at p. 26)

Consequently, the ALJ's recommendation to dismiss respondent from her tenured teaching position in the employ of the Board is adopted for the reasons expressed by the ALJ and by the Commissioner above in regard to his determination that incompetency was proven. Therefore, it is ordered that respondent be dismissed from her teaching position as of the date of this decision. The matter shall be forwarded to the State Board of Examiners pursuant to N.J.A.C. 6:11-3.7(b) for review and action as it deems appropriate.

COMMISSIONER OF EDUCATION

Pending State Board

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 8042-89
AGENCY DKT. NO. 313-9/89

MARISSA MAGLIOZZI,

Petitioner,

v.

BOARD OF EDUCATION OF THE CITY OF JERSEY CITY,

Respondent.

Philip Feintuch, Esq., represented petitioner
(Feintuch & Porwich, attorneys)

David F. Corrigan, Esq., represented respondent
(Murray, Murray & Corrigan, attorneys)

Record Closed: April 10, 1990 Decided: April 19, 1990

BEFORE **WARD R. YOUNG**, ALJ:

I

Petitioner, a tenured teaching staff member employed by respondent (Board), seeks back pay during the period of her suspension without pay from her teaching duties from March 18, 1988 to September 6, 1989. The Board denies any such entitlement and seeks dismissal of the petition for untimeliness (N.J.A.C. 6:24-1.2(b)), and avers in the alternative that the relief sought is barred due to the equitable doctrines of laches and/or unclean hands.

The matter was transmitted to the Office of Administrative Law on October 20, 1989 as a contested case pursuant to N.J.S.A. 52:14F-1 et seq. A prehearing conference

was held on February 1, 1990, at which the parties agreed to submit the matter for summary decision. The record closed upon the filing of briefs on April 10, 1990.

II

The following, stipulated by counsel in a jointly executed document, are adopted herein as **FINDINGS OF FACT:**

1. Petitioner is presently employed as a tenured teaching staff member by the respondent. She commenced employment with respondent in October 1981.

2. Petitioner was continuously employed until February 1988, when she was suspended from her position with pay as a result of her arrest on charges involving illicit drug activity.

3. On March 16, 1988, the respondent passed Resolution 11.1 providing that "Any Board employee indicted for his/her involvement in an illicit drug related activity . . . shall be suspended immediately without pay." (J-1)

4. On March 16, 1988, the petitioner was indicted on three (3) counts relating to illicit drug activity.

5. On March 18, 1988, the respondent passed Resolution 10.12 whereby petitioner was immediately suspended without pay pending resolution of the charges against her. (J-2)

6. On February 27, 1989, the petitioner was entered into a conditional discharge program pursuant to N.J.S.A. 2C:36A-1 wherein she was placed on approximately six (6) months of supervisory treatment. (J-4). Accordingly, the First and Third Counts of Indictment No. 678-05-88 were dismissed and the Second Count was amended to a disorderly persons offense.

7. On August 28, 1989, the petitioner successfully completed her program of supervisory treatment.

8. On August 30, 1989, the respondent passed Resolution 10.24 whereby it was resolved that petitioner "be restored to duty as a tenured teacher and as the Board may direct." (J-3)

9. Effective September 6, 1989, the petitioner was reinstated as a full-time tenured teaching staff member and continues to be employed in that capacity.

10. On September 29, 1989, a certified petition was filed with the Commissioner of Education.

11. On October 16, 1989, the respondent submitted its answer to the petition.

III

The issue of the alleged untimely filing will first be addressed as the respondent seeks dismissal of the Petition based on the doctrine of laches and its belief that petitioner violated the 90-day rule, N.J.A.C. 6:24-1.2.

It is not disputed that the Petition was filed with the Commissioner of Education on September 29, 1989. The respondent argues that the cause of action occurred on March 18, 1988 when petitioner Magliozzi was suspended without pay by the respondent Board. Respondent further argues against relaxation of the 90-day rule pursuant to N.J.A.C. 6:24-1.17 because it would cause substantial prejudice to the Board because the Board could have certified a charge of unbecoming conduct if there was a timely filing.

Petitioner argues the cause of action did not occur until she successfully completed the six-month program of supervisory treatment resulting from her entry into the conditional discharge program on February 27, 1989 pursuant to N.J.S.A. 2C:36A-1 which occurred on August 28, 1989, or on August 30, 1989 when the Board restored her to her position as a teaching staff member. In either case, she avers, the Petition was filed within the following 30 days.

I first reject the Board's argument of prejudice in the absence of what it perceives to be a timely filing of the Petition. The Board most certainly was not precluded from processing and certifying a charge of unbecoming conduct against Magliozzi where she did or did not file a claim for back pay, notwithstanding that her tenured position may have been forfeited pursuant to N.J.A.C. 2C:51-2.

The adjudication of this issue must rest on the determination of when the cause of action occurred. Petitioner surely did not know when she was indicted on March 16, 1988 if she would ever be eligible for restoration to her teaching position. This was not known upon entry into the conditional discharge program on February 27, 1989, and would not be known until the expiration of the required six months of supervisory treatment under that program. Eligibility for restoration as a teacher was in fact not known until her successful completion of the supervisory treatment program on August 28, 1989.

I **FIND** the cause of action occurred with her restoration to her position as a teaching staff member by the Board on August 30, 1989 and **CONCLUDE** the Petition to have been timely filed.

IV

The back pay issue during petitioner's period of suspension without pay from March 16, 1988 through the 1988-89 school year will now be addressed.

It is not argued that petitioner's suspension from her teaching position was triggered by her arrest in February 1988 on charges involving illicit drug activity. Her entry into the conditional discharge program pursuant to N.J.S.A. 2C:36A-1 resulted in a dismissal of the first and third counts and the amendment of the second count to a disorderly persons offense.

Petitioner argues for back pay on the basis that she was never found guilty of either an indictable offense or a disorderly persons offense, and relies on an unreported decision of the State Board of Education on June 7, 1989 in the Tenure Hearing of Fridy, Long Branch. She maintains there is no statutory basis to deny a teacher pay for a period of suspension under an indictment once that indictment is dismissed.

Petitioner also argues that N.J.S.A. 2C:36A-1 entitles her to back pay as "This statute clearly holds that anyone partaking of the benefit of this statute and successfully completing the requirements therein is not found guilty, nor shall he/she be deemed to have been convicted of a crime or disorderly persons offense." Pb at 2.

Petitioner finally argues that the Board's resolution of March 16, 1988 entitled her to back pay as it says therein that "The Board shall reimburse the individual retroactively to the date of suspension only if he/she is found not guilty."

The Board relies on N.J.S.A. 18A:6-8.3 which prohibits suspension with pay upon indictment. The Board also relies on Fridy and the State Board's interpretation of the intent of the aforementioned statute.

DISCUSSION

It must first be recognized that the conditional discharge program embodied in N.J.S.A. 2C:36A-1 is a creature of the Legislature designed for certain first offenders. Incorporated in that statute at 2b at paragraph 3 is the following:

> Upon violation of a term or condition of supervisory treatment the court may enter a judgment of conviction and proceed as otherwise provided, or where there has been no plea of guilty or finding of guilty, resume proceedings. Upon fulfillment of the terms and conditions of supervisory treatment the court shall terminate the supervisory treatment and dismiss the proceeding against him. Termination of supervisory treatment and dismissal under this section shall be without court adjudication of guilt and shall not be deemed a conviction for purposes of disqualifications or disabilities, if any, imposed by law upon conviction of a crime or disorderly persons offense but shall be reported by the clerk of the court to the State Bureau of Identification criminal history record information files. Termination of supervisory treatment and dismissal under this section may occur only once with respect to any person. Imposition of supervisory treatment under this section shall not be deemed a conviction for the purposes of determining whether a second or subsequent offense has occurred under section 29 of P.L. 1970, c.226 (C. 24:21-29), chapter 35 or 36 of this title or any law of this State.

It is clear that the completion of the supervisory treatment under this diversionary program resulted without a court adjudication of guilt, but was reported to the State Bureau of Identification criminal history record information files.

The issue of back pay entitlement was addressed at great length in Thadeus Pawlak v. Board of Education of the Borough of Hopatcong, 1988 S.L.D. _____ (decided January 27, 1988), aff'd State Board of Education, 1988 S.L.D. _____ (decided June 1, 1988), aff'd N.J. Super. A-5083-87T2 (App. Div. July 12, 1989) (unreported).

Pawlak, a former tenured teaching staff member, sought indemnification benefits including back pay pursuant to N.J.S.A. 18A:16-6 and N.J.S.A. 18A:16-6.1 as the result of the dismissal of criminal charges following the successful completion of his participation in the Pretrial Intervention Program (PTI), another diversionary program created by the Legislature.

Pawlak was also suspended without pay pursuant to N.J.S.A. 18A:6-8.3 by reason of indictment.

The nexus between Pawlak and the instant matter is found in State v. DeMarco, 107 N.J. 562, 568 (1987), wherein the Supreme Court recognized that conditional discharge of drug offenses and dismissal of charges after PTI are similar. The Appellate Court determined that completion of a PTI program or a conditional discharge under N.J.S.A. 2C:36A-1 does not constitute a favorable disposition of charges as there is no determination of either guilt or innocence. See, Thomas v. New Jersey Institute of Technology, 178 N.J. Super. 60 (Law Div. 1981). See also, Kerwick v. Trenton, 184 N.J. Super. 235 (Law Div. 1982); Lindes v. Sutter, 621 F. Supp. 1197 (D. N.J. 1985).

Pawlak also suggested that the Board acted improperly by its suspension of him pursuant to N.J.S.A. 18A:6-8.3 instead of filing tenure charges against him. The Appellate Court found otherwise.

I **FIND** Pawlak dispositive of the instant matter in the determination that Magliozzi is not entitled to back pay during her suspension period. I **FURTHER FIND** no compelling reason to address the doctrine of unclean hands.

I **CONCLUDE**, therefore, that the Petition shall be and is hereby **DISMISSED. IT IS SO ORDERED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with Saul Cooperman for consideration.

19 April 1990
DATE

WARD R. YOUNG, ALJ

Receipt Acknowledged:

4/24/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 24 1990
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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MARISSA MAGLIOZZI,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE CITY OF JERSEY CITY, HUDSON COUNTY,	:	DECISION
RESPONDENT	:	
	:	

The record of this matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful consideration, the Commissioner concurs with the ALJ that Pawlak, supra, controls in this matter. Therein, particularly in the language of the Appellate Division ruling, it is abundantly clear that successful completion of a program such as Pretrial Intervention or conditional discharge does not constitute the adjudication of innocence necessary to activate statutes, regulations or policies designed to retroactively indemnify persons proven blameless. Rather, these programs bypass the adjudicative process altogether, thus avoiding both the risks of being found guilty (e.g. forfeiture of public employment) and the benefits of being proven innocent. Absent such adjudication, petitioner has no entitlement to back pay for the period of her suspension by reason of indictment.

Accordingly, the initial decision of the Office of Administrative Law dismissing the instant Petition of Appeal is affirmed for the reasons stated therein.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
SETTLEMENT
OAL DKT. NO. EDU 8668-89
AGENCY DKT. NO. 328-10/89

BOARD OF EDUCATION OF THE CITY OF PASSAIC,

Petitioner,

v.

HAROLD KENNER,

Respondent.

Matthew J. Michaelis, Esq., represented petitioner

Gerald R. Salerno, Esq., represented respondent
(Aronsohn, Springstead & Weiner, attorneys)

Record Closed: April 17, 1990 Decided: April 19, 1990

BEFORE **WARD R. YOUNG**, ALJ:

The Passaic Board of Education certified a charge of unbecoming and unprofessional conduct against tenured teaching staff member Harold Kenner and filed same with the Commissioner of Education on October 24, 1989.

The Commissioner transmitted the matter to the Office of Administrative Law as a contested case on November 13, 1989 pursuant to N.J.S.A. 14F-1 et seq. A Prehearing Order was entered on December 11, 1989 which incorporated a hearing schedule of ten days which was to commence on March 16, 1990. The hearing was adjourned on representation of counsel that the matter was amicably resolved. A jointly executed Stipulation of

Settlement was filed with the undersigned on April 17, 1990, which is attached hereto. The record closed on the date of filing.

A review of the terms of agreement reveals that the amicable resolution was arrived at voluntarily and basically requires the Board to provide a payment of $8,750 upon the forfeiture of tenure by way of a resignation by Kenner.

I **FIND** the settlement agreement is consistent with the standards incorporated by the State Board of Education in Frank Cardonick v. Board of Education of the Borough of Brooklawn, Camden County, 1983 S.L.D. ____ (decided April 6, 1983) as the implementation of settlement terms are subject to the approval of the Commissioner. I **ALSO FIND** the settlement agreement consistent with N.J.A.C. 1:1-19.1 as well as the public interest and in the best interests of the parties. I **FURTHER FIND** the agreement herein to be consistent with the Consent Order executed by the Honorable Baruch S. Seidman, J.A.D. on January 2, 1990 in William David Guyet v. Board of Education of the Borough of Caldwell-West Caldwell, Essex Co., (App. Div. Dkt. No. A-538-89T5), wherein Guyet was restored his salary increments for 1988-89 and 1989-90, received full pay from January 1, 1990 to June 30, 1990 on an approved leave of absence, and submitted his resignation effective June 30, 1990.

I **CONCLUDE**, therefore, that this matter shall be and is hereby **DISMISSED WITH PREJUDICE.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN**, who by law is empowered to make a final decision in this matter. However, if Commissioner Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** this Initial Decision with Saul Cooperman for consideration.

19 April 1990
DATE

WARD H. YOUNG, ALJ

Receipt Acknowledged:

4/24/90
DATE

DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 25 1990
DATE

FOR OFFICE OF ADMINISTRATIVE LAW

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EXTRACT FROM THE MINUTES OF A MEETING OF THE BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY, N.J., AS RECORDED IN THE OFFICIAL MINUTE BOOK

The Board of Education of the City of Passaic, County of Passaic, New Jersey, convened in public session on April 11, 1990, at 6:00 p.m., in the Board Rooms, 101 Passaic Avenue, Passaic, New Jersey.

The following members of the Passaic Board of Education were present: Mr. Capuana, Mr. Gentile, Mr. Cancel, Mr. Salerno, Mr. Fuentes, Mr. Garcia, Mrs. Paduch, Mr. Cirignano, and Mrs. Guzman.

The following motion was made by Mrs. Paduch, and seconded by Mr. Salerno.

TITLE OF RESOLUTION: Resolution Approving Settlement Agreement

AYES: 9

NOES: 0

TEXT OF RESOLUTION:

Your Committee of the Whole recommends that the Settlement Agreement in the matter of Board of Education of the City of Passaic vs. Harold Kenner be and the same is hereby approved; and

Your Committee of the Whole further recommends that the Board Secretary and President are hereby authorized to sign and execute said Settlement Agreement.

I, Samuel G. Jarkesy, Secretary of the Board of Education of the City of Passaic in the County of Passaic, State of New Jersey, hereby certify that the foregoing extract from the minutes of the meeting of the Passaic Board of Education duly called and held on April 11, 1990, has been compared by me with the original minutes as officially recorded in my office in the minutes book of said Passaic Board of Education is a true, complete copy thereof and of the whole of said original minutes so far as the same related to the subject matter referred to in said extract. In witness I have hereunto set my hand and affixed the corporate seal in the Passaic Board of Education this twelfth day of April, 1990.

Samuel G. Jarkesy

Board Secretary

Aronsohn, Springstead & Weiner, Esqs.
263 Main Street
Hackensack, New Jersey 07601
Attorneys for the Respondent

OFFICE OF ADMINISTRATIVE LAW
OAL DOCKET NO. EDU-08668-89
AGENCY REF. NO. 328-10/89

IN THE MATTER OF THE TENURE HEARING OF HAROLD KENNER, BOARD OF EDUCATION OF THE CITY OF PASSAIC, PASSAIC COUNTY. : Administrative Action
: STIPULATION OF SETTLEMENT

---x

THE PETITIONER, Board of the Education of the school district of Passaic, Passaic County ("Board"), and Respondent, Harold Kenner, being fully aware of the requirements for a settlement agreement as announced by the State Board of Education in Frank Cardonik v. Board of Education of the Borough of Brooklawn, Camden County, (State Board decision April 8, 1983), hereby agree that this matter shall be deemed settled and withdrawn, based upon the following terms and conditions, subject to the approval of the Administrative Law Judge and Commissioner of Education:

WHEREAS, the Respondent, a tenured teacher, has been employed by the Board of Education as a music teacher since September, 1977; and

WHEREAS, the Board of Education certified tenure charges against the Respondent on October 12, 1989, and suspended him without pay, pending resolution of the charges by the Commissioner of Education; and

WHEREAS, prior to the Board certifying the charges, the

Respondent submitted an Answer to the Board, in which he denied the charges against him; and

WHEREAS, the Respondent has simultaneously, with the execution of this agreement, tendered his resignation to the Board of Education, subject to approval of this settlement by the Commissioner of the Education, and will waive any claims to reinstatement and backpay; and

WHEREAS, the Board has accepted the resignation, subject to acceptance of this settlement agreement by the Commissioner of Education; and

WHEREAS, the Respondent has been fully advised of his rights, and enters into this Agreement voluntarily;

IT IS, THEREFORE, AGREED that the Respondent will resign, and will not seek re-employment with the Passaic Board of Education, and will waive any claims he has to reinstatement and backpay; and it is further

AGREED that the Board of Education will withdraw the tenure charges against the Respondent, and pay to the Respondent the sum of $8,750.00.

THE REASONS FOR ENTERING INTO THIS AGREEMENT ARE AS FOLLOWS:

A. The costs of prosecuting the tenure claims against the Respondent are expected to be substantial;

B. The alleged incidents against the Respondent are all reported by bi-lingual students, and there may be some difficulty in translating their version of the alleged events;

C. The Respondent is waiving his rights to receive any

back salary to which he is entitled after the 121st day from the suspension period, pursuant to N.J.S.A. 18A:6-14, thus, constituting a savings of public funds.

D. The Respondent will not seek re-employment with the Petitioner, Passaic, Board of Education.

E. The Respondent recognizes and has been fully advised that pursuant to N.J.A.C. 6:11-3.7, the Commissioner of Education may forward this matter to the State Board of Examiners for possible revocation or suspension of his teaching Certificates.

The parties hereto agree that this Agreement is subject to approval by the Commissioner of Education, and in the event the Commissioner reject any term of this Agreement, the matter shall be returned to the Office of Administrative Law for hearings, without prejudice to the parties' right to attempt to reach further settlement.

WITNESS:

Laura Denti
LAURA DENTI
Notary Public of New Jersey
My Commission Expires June 11, 1992

By: Samuel G. Jarkesy
Samuel G. Jarkesy
Secretary, Passaic Board of Education

Harold Kenner, Respondent

BOARD OF EDUCATION

By: Vincent Capuana
Vincent Capuana, President
Board of Education

ARONSOHN, SPRINGSTEAD & WEINER
Attorneys for the Respondent

By: Gerald R. Salerno
Gerald R. Salerno

Matthew J. Michaelis
Attorneys for Passaic Board of Education

IN THE MATTER OF THE TENURE	:	
HEARING OF HAROLD KENNER, SCHOOL	:	COMMISSIONER OF EDUCATION
DISTRICT OF THE CITY OF PASSAIC,	:	DECISION
PASSAIC COUNTY.	:	
	:	

The record and initial decision rendered in the form of a joint stipulation of settlement have been reviewed. No exceptions were filed by the parties.

The Commissioner has carefully and independently reviewed the charges certified by the Board, as well as the written statements of evidence made a part of the certified tenure charges and the Answer and affirmative defenses to said charges. Based upon such review, the Commissioner finds and determines that the charges herein delineated are of such a serious nature, involving allegations of inappropriate advances toward female students, sexually explicit language and inappropriate touching of female students, as well as harassment against a tenured music teacher, as to preclude their disposition in the manner provided for in the Stipulation of Settlement entered into by the parties.

In so concluding, the Commissioner relies on his conclusions as embodied in the case entitled In the Matter of the Tenure Hearing of Kenneth S. Smith, School District of the City of Orange, Essex County, decided by the Commissioner March 22, 1982, wherein he stated:

> The Commissioner assumes that a board of education, when it certifies tenure charges pursuant to the statutory formula prescribed in N.J.S.A. 18A:6-11, is fully cognizant of the gravity of its responsibilities. The Commissioner observes that such statutory formula requires that:
>
> > "***The board of education shall forthwith provide such employee with a copy of the charge, a copy of the statement of the evidence and an opportunity to submit a written statement of position and a written statement of evidence under oath with respect thereto. After consideration of the charge, statement of position and statements of evidence presented to it, the board shall determine by majority vote of its full membership whether there is probable cause to credit the evidence in support of the

> charge and whether such charge, if credited, is sufficient to warrant a dismissal or reduction of salary.***"

The Commissioner further observes that any board embarking upon such course of action does so in full knowledge that it may not lay down such burden without a careful weighing of public interest as well as the interest of the parties. In the instant matter, the Commissioner cannot construe that the settlement as herein contemplated can possibly serve either the interests of justice to the individual so charged or the broader public interest. If respondent is innocent of the charges certified, he deserves the opportunity of removing from his reputation the stigma attached to such accusations. If, on the other hand, the Board demonstrates by a preponderance of the credible evidence that such acts of corporal punishment did take place, the Commissioner may not only impose the penalty of dismissal, but may also, if the circumstances so warrant, refer said matter to the State Board of Examiners for further proceedings pursuant to the revocation of respondent's certificate.

Whenever presented with the necessity for exercising his statutory responsibility for establishing a penalty pursuant to a tenure charge or, in the alternative, accepting a settlement of such matter, the Commissioner is fully cognizant of the heavy burden imposed upon him to carefully and fully consider the impact of his determination on the parties to the controverted matter, as well as the possible consequences of his decision upon the statewide system of education. While the Commissioner in no way seeks to pre-determine the guilt or innocence of respondent, he cannot in good conscience condone a settlement which would permit an individual charged with systematically inflicting corporal punishment on numerous young children to seek and obtain employment elsewhere within the public schools of New Jersey or any other state until the hearing process established for reaching a determination in such matters has run its full course.

The Commissioner is further constrained to observe that he regards the entire matter of the settlement of tenure charges as being particularly subject to his most careful and deliberate scrutiny. The Commissioner believes such diligence to be essential in ensuring that the purposes of the Tenure Employees Hearing Act (N.J.S.A. 18A:6-10 et seq.) are not subverted in

> a piecemeal fashion through settlement of convenience obtained at the expense of public funds and which may fail to fully take into account both the local and statewide public interest. See In Re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967). (Slip Opinion, at pp. 4-6)

In light of the allegations in the instant matter, the Commissioner does not concur with the ALJ that the standards set forth in such cases as In re Fulcomer, supra, and In re Cardonick, decided by the Commissioner April 7, 1982, aff'd State Board April 6, 1983 have been met. In addition to his concern about the grave nature of the allegations posed in this matter, the Commissioner likewise cannot condone language incorporated in a settlement such as that contained at page 2 of the settlement, where, in listing reasons for entering into said agreement, the parties stipulate:

> B. The alleged incidents against the Respondent are all reported by bi-lingual students, and there may be some difficulty in translating their version of the alleged events***.
>
> (at p. 2)

Is the Commissioner thus to provide lesser protections against alleged molestation and harassment to those students whose language might make translation during testimony somewhat difficult? In fact, the answer to the the above rhetorical inquiry is "No." In remanding this matter for plenary hearing on the merits of the charges certified to him, the Commissioner specifically directs that whatsoever measures are necessary to ensure a full and fair opportunity for both sides of this controversy to present their cases be provided, including, if necessary a translator or translators, as need be.

Accordingly, the instant settlement is rejected for the reasons expressed herein. The Commissioner remands the instant matter to the Office of Administrative Law for a plenary hearing on the merits of the tenure charges certified to him by the Board.

IT IS SO ORDERED this _____ day of May 1990.

COMMISSIONER OF EDUCATION

FRANK CARDONICK,	:	
PETITIONER,	:	
V.	:	
BOARD OF EDUCATION OF THE BOROUGH OF BROOKLAWN, CAMDEN COUNTY,	:	
RESPONDENT,	:	COMMISSIONER OF EDUCATION
AND	:	DECISION
IN THE MATTER OF THE TENURE HEARING OF FRANK CARDONICK, SCHOOL DISTRICT OF THE BOROUGH OF BROOKLAWN, CAMDEN COUNTY.	:	

This matter has been presented to the Commissioner as an Initial Decision Substantive Order Concluding Case based upon a settlement agreement reached between the parties as set forth below:

> "The above matters having been amicably resolved by the parties, in that Mr. Cardonick has received $24,873.00 from the Board of Education of the Borough of Brooklawn and in consideration thereof has resigned his position as a tenured teaching staff member, it is hereby stipulated and agreed that the above matters be and the same are hereby dismissed without cost against either party with prejudice."
>
> (Emphasis supplied.)

The Commissioner notes that the matter herein controverted was opened before him by Petition of Appeal filed by Frank Cardonick on August 27, 1981 alleging the improper and illegal withholding of an increment for the 1981-82 school year. Subsequent to said filing, the Board of Education of the Brooklawn Public Schools (Board) filed tenure charges against Frank Cardonick (Respondent) pursuant to the provisions of N.J.S.A. 18A:6-10 et seq., said charges and the answer thereto having been transmitted to the Office of Administrative Law as a contested case with recommendations for possible consolidation of the two matters.

The Commissioner has reviewed the papers filed by the parties in the instant matter, as well as the settlement agreed to by the parties and approved by the Honorable August E. Thomas, ALJ. The Commissioner notes that the language contained within the agreement indicates that the parties had carried out the terms of said agreement prior to its recommended approval by the Administrative Law Judge and its affirmance by the Commissioner. The Commissioner finds such action to be entirely without legal authority.

The Commissioner observes that the Board, having filed charges against a tenured teaching staff member pursuant to the Tenure Employees Hearing Act (N.J.S.A. 18A:6-10 et seq.) and having certified that such charge pursuant to N.J.S.A. 18A:6-11 "***if credited is sufficient to warrant a dismissal or reduction of salary", may not by virtue of its unilateral actions terminate such matter by the imposition of a penalty either against itself, the respondent party or both. Speaking to the question of who may impose a penalty in a tenure matter, the Appellate Division of the Superior Court has said In re Fulcomer, 93 N.J. Super. 404 (App. Div. 1967):

> "***The Tenure Employees Hearing Act thus establishes an entirely new and comprehensive procedure for the resolution of all controversies involving charges against all tenure employees not subject to Civil Service under Title 18. It is designed to replace the removal and disciplinary procedure relating to various classes of employees long in force under a variety of provisions of the New Jersey School Laws***.
>
> "Formerly all phases of the hearing and decision making function were performed by the local boards. The Commissioner reviewed such determinations on appeal pursuant to the general power conferred upon him to 'decide *** all controversies and disputes arising under the school laws.' R.S. 18:3-14.
>
> "Now the Commissioner conducts the initial hearing and makes the decision. Indicative of the intention to vest finality of decision on all aspects of the charges is the power given him to dismiss the charges before such hearing if he determines them to be insufficient in law. He is directed to render a decision on the charge within 60 days after the close of the hearing. A strict and precise timetable for the disposition of each stage of the proceeding represents legislative recognition of the importance of a prompt resolution of such disputes.

"There is nothing in the new act which suggests the local boards were intended to retain any part of the jurisdiction which they formerly exercised in such controversies other than a preliminary review of the charge and the required certification to the Commissioner. Their participation in such proceedings is specifically confined to that limited function. Thus, the Legislature has transferred, from the local boards to the Commissioner, the duty of conducting the hearing and rendering a decision on the charge in the first instance. His jurisdiction in all such cases is no longer appellate but primary.

"The pivotal words of the statute are that the Commissioner shall 'conduct a hearing' on the charge and 'render a decision.' The requirement of a hearing has been held to mean the hearing of evidence and argument and judgment thereon. See In re Masiello, 25 N.J. 590, 600 (1958).

"The legislative mandate to 'render a decision *** on the charge' implies a duty on his part to review the evidence and to resolve all issues necessary to a final determination. It means that the Commissioner must settle or determine the controversy by giving judgment. The imperative of 'render[ing] a decision *** on the charge' is not satisfied by a simple finding whether the charge is true in fact coupled with a statement of the maximum penalty such misconduct may warrant. To confine the Commissioner's function to this limited sphere would not only deprive him of a part of the decision-making function, it would also make his role a sterile one. The power to impose the penalty is necessary to make his hearing and decision meaningful. Common sense dictates that he must have and exercise the power to impose the penalty gauged by the evidence before him at the hearing.

"On the other hand, nothing in the statute suggests that the local boards were intended to retain that power. It contains no express language to that effect, or language from which any such intention can fairly be implied. Indeed, the fact that the Legislature saw fit to confer upon the local

boards the power to make a preliminary review of the sufficiency of the charge and to spell out the scope of that review negates any intention of conferring any additional power upon them in the process.***"
(Emphasis supplied.) (at 411-413)

The Commissioner observes that the foregoing language makes unmistakably clear that a local board of education may not bring a tenure matter to a close without a decision rendered by the Commissioner or by his express approval of any settlement concluded by the parties. In the instant matter, the Board, having paid respondent $24,873.00 and in return accepted his resignation prior to submitting such settlement agreement to the Commissioner for his approval, clearly exceeded its authority. Consequently, such action by the Board and the agreement setting forth such terms are and are hereby declared to be ultra vires and without force.

Having so concluded, the Commissioner notes that respondent's tenure rights as a teaching staff member in the Brooklawn Public Schools are and remain intact as they were at the time such ultra vires agreement was effectuated.

Notwithstanding such determination and assuming arguendo that such settlement had been appropriately submitted to him by the parties prior to its implementation, the Commissioner is constrained to observe that he views with an increasingly jaundiced eye settlements reached in tenure matters which are opened upon proper certification of charges as prescribed by statute and under statutory formula, but which are concluded by lump sum payments to respondent parties. While not precluding his approval of such settlements, the Commissioner wishes to make clear that he will carefully examine the factual circumstances surrounding each settlement so proposed, both as to the nature of the charges involved in such matter as well as to the exact terms of the settlement. The Commissioner deems such careful scrutiny to be essential to the maintenance of the integrity of the Tenure Employees Hearing Act (N.J.S.A. 18A:6-10 et seq.) and to preserve both his statutorily conferred and judicially defined responsibility for rendering determinations in tenure matters and his responsibility for ensuring that determinations reached serve not only the interest of the parties but also the broader public interests. Accordingly, this matter is remanded to the Office of Administrative Law for disposition consistent with this decision and applicable law.

IT IS SO ORDERED this ____ day of April 1982.

COMMISSIONER OF EDUCATION

EDU #7093-81
7094-81
100-82

FRANK CARDONICK,

PETITIONER-APPELLANT,

V.

BOARD OF EDUCATION OF THE BOROUGH OF BROOKLAWN, CAMDEN COUNTY,

RESPONDENT-RESPONDENT,

AND

IN THE MATTER OF THE TENURE HEARING OF FRANK CARDONICK, SCHOOL DISTRICT OF THE BOROUGH OF BROOKLAWN, CAMDEN COUNTY.

STATE BOARD OF EDUCATION

DECISION

Decided by the Commissioner of Education, April 7, 1982

Decided by the State Board of Education, August 4, 1982

For the Petitioner-Appellant, Selikoff & Cohen
(John E. Collins, Esq., of Counsel)

For the Respondent-Respondent, William D. Dilks, Esq.

For the Amicus Curiae, New Jersey School Board Association, David W. Carroll, Esq.

This consolidated tenure and increment withholding case was settled by the attorneys for the parties on January 4, 1982. The executed stipulation of dismissal was received by the Office of Administrative Law on January 13, 1982. On February 17, 1982, the Administrative Law Judge dismissed the matters with prejudice and presented the terms of the settlement to the Commissioner of Education. The Commissioner's decision was rendered April 7,

1982, and this joint appeal to the State Board of Education followed. The New Jersey School Boards Association was granted leave to appear as amicus curiae and has filed a brief in this matter.

On the settlement, the Commissioner has questioned the propriety and legality of the agreement executed by the attorneys for the parties. The settlement agreement is repeated below in its entirety:

> "The above matters having been amicably resolved by the parties, in that Mr. Cardonick has received $24,873.00 from the Board of Education of the Borough of Brooklawn and in consideration thereof has resigned his position as a tenured teaching staff member, it is hereby stipulated and agreed that the above matters be and the same are hereby dismissed without cost against either party with prejudice."

In setting aside the settlement agreement, the Commissioner specifically disapproved its execution without his prior approval and remanded to the Office of Administrative Law. The Commissioner's objections to the settlement are set forth in general terms. In the absence of a record, aside from the pleadings and briefs filed before the State Board, we too are precluded from specific evaluation or review. The criteria and guidelines which we consider to be of importance in evaluating and reviewing tenure settlements are addressed post.

The New Jersey courts have looked with great favor upon the voluntary resolution of litigation through settlement. Judson v. Peoples Bank & Trust Co., 25 N.J. 17 (1957); Honeywell v. Bubb, 130 N.J. Super. 130 (App. Div. 1974). As a general

principle, and without considering the toll of human resources, the settlement of lawsuits in good faith can be said to save time, money and proof problems. School boards, in their efforts to conserve public funds, no less than private parties, have been encouraged by the state and federal courts to carefully consider equitable settlement possibilities. As the court stated in Board of Education of Garfield v. State Board of Education, 130 N.J.L. 388, 392 (1943):

> "***A Board of Education of any municipality in our state may, among other things, 'sue and be sued.' N.J.S.A. 18:6-23. Thus, it may and should, if it can possibly do so, avoid the costs and expenses of useless litigation, of multiplicity of suits.***"

The school board's power to sue (N.J.S.A. 18A:11-2) necessarily implies the power to commence or prosecute, to determine the manner or strategy of proceeding, to determine how a suit may be terminated, including settlements, compromise or discontinuance of actions in which it is lawfully engaged as a party. This power is undisputed, but certainly not unlimited. School boards may not act in a manner which is contrary to public policy. School boards must act in the public interest, lawfully, constitutionally, reasonably and in accordance with duly enacted rules and regulations of the Commissioner of Education and State Board of Education. In this case, we focus on the determination of a school board to compromise and settle tenure litigation against the goals of the Tenure Employees Hearing Law.

The Tenure Employees Hearing Law (N.J.S.A. 18A:6-10 et seq.) is a comprehensive scheme of legislation designed to

improve education by affording teachers a measure of security in the ranks they hold. Viemeister v. Board of Education of Borough of Prospect Park, 5 N.J. Super. 215 (1949). The law regulates all of the various aspects of tenure hearings. Provisions relating to the jurisdiction of the Commissioner, the role of the local board of education, grounds for dismissal or reduction in salary, manner of filing charges, service of charges, suspension pending final determination, conduct of hearing, compensation during suspension, and reinstatement are set forth in the statute. What constitutes grounds for a tenure dismissal is a question of fact and within the exclusive jurisdiction of the Commissioner of Education, who has the duty to conduct the hearing and render a decision. In the Matter of the Tenure Hearing of David Fulcomer, 93 N.J. Super. 404, 412 (App. Div. 1965).

The Commissioner's exclusive authority to decide these cases necessarily entails the determination of any and all matters pertinent thereto in order to make a complete disposition of the case. It is proper, therefore, for the Commissioner to review and evaluate, and to approve and disapprove, tenure settlements. We believe that settlement agreements totally preempting the Commissioner from review and evaluation are against the public policy of this State as exemplified in the Tenure Employees Hearing Law.

The touchstone of the Tenure Employees Hearing Law is the teacher's fitness to teach. In Re Grossman, 127 N.J. Super.

13 (1974). Certification of tenure charges by a board of education is predicated on the board's belief that the charges (inefficiency, incapacity, unbecoming conduct, or other just cause) and the evidence in support of the charges would be sufficient, if true in fact, to warrant a dismissal or reduction in salary. N.J.S.A. 18A:6-11.

On the basis that the board believes the teacher is unfit, it makes the commitment to expend its monetary resources, provide board personnel, and hire legal counsel to obtain relief; i e., dismissal or reduction in salary. Where the facts of a case are clear, using the settlement process to achieve either of the statutorily prescribed results is prudent. Where the facts are not clear, or in dispute, a settlement for less than dismissal may be justified, bearing in mind that settlement may be inappropriate in certain matters. Where it is in the public interest to fully determine the issues, a plenary hearing is required.

We believe a proposed tenure settlement or a withdrawal of tenure charges with its attendent terms and conditions should be submitted to the Commissioner of Education for his prior scrutiny and approval. The proposed tenure settlement or withdrawal should be accompanied by supporting documentation as to the nature of the charges, circumstances justifying the settlement, consent or authorization by the board of education and the teacher to the proposed agreement, the Administrative Law Judge's findings that the teacher entered into the agreement with a full

understanding of his rights, and that the agreement is consistent with the public interest. (See N.J.A.C. 1:1-17.1(b), (c)) In this case there is no indication that the teacher was advised of the Commissioner's duty pursuant to N.J.A.C. 6:11-3.7(b)1.i. to refer tenure determinations to the State Board of Examiners for possible revocation of certificate. We believe that disclosure should be part of any agreement which results in loss of position.

The absence of any record in this case allowed no opportunity for the Commissioner's review. No hearing was held below. Two prehearing conferences scheduled for November 30 and December 29, 1981, were adjourned. It is not disclosed whether the teacher received full salary during the suspension, beginning on the 121st day, excluding all delays granted at his request. (N.J.S.A. 18A:6-14) It is not disclosed whether the teacher had other employment during the suspension. The record shows that the Administrative Law Judge received the agreement and without further inquiry dismissed with prejudice. Under the circumstances, we believe the Administrative Law Judge should have rejected the agreement and inquired into these matters.

For the reasons stated above, and subject to the guidelines and objections we have expressed, the Commissioner's decision to remand is affirmed.

Attorney Exceptions are noted.

April 6, 1983

Date of Mailing APR 0 8 1983

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NO. EDU 7602-89
AGENCY DKT. NO. 303-9/89

JOAN R. VERNON,
Petitioner,
v.
HOLMDEL TOWNSHIP BOARD OF EDUCATION AND TIMOTHY C. BRENNAN,
Respondents.

James W. Tabak, Esq., for petitioner, Robert A. Weir, Jr., Esq., on the brief (Vernon and Aaron, attorneys)

Martin M. Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Bruno & Barger, attorneys)

RECORD CLOSED: April 11, 1990 Decided: April 19, 1990

BEFORE **DANIEL B. MC KEOWN**, ALJ:

Joan R. Vernon (petitioner) initially filed a two count complaint in New Jersey Superior Court, Monmouth County against the Holmdel Township Board of Education and its superintendent of schools, Timothy C. Brennan (respondent), in which she claims reasonable reliance upon an offer of employment as a substance abuse counsellor made to her by the superintendent, that such employment was to commence December 1, 1988, and that based on that offer she notified her then present employer of her resignation to accept employment in the Holmdel Township Pulic Schools, only to be subsequently notified prior to December 1, 1988 that the respondent Board changed the requirements for the position and that she was no longer being considered for employment. The Honorable Alvin Yale Milberg, A.J.S.C., transferred the matter to the Commissioner of Education on September 15, 1989 as a dispute arising under the school laws governed by N.J.S.A. 18A:6-9.

Thereafter, the Commissioner transferred the matter on October 4, 1989 to the Office of Administrative Law as a contested case under the provisions of N.J.S.A. 52:14F-1 et seq. A telephone prehearing conference was conducted February 9, 1990 during which counsel for the Board advised that a motion for summary decision seeking dismissal of the matter was to be filed by the Board on the following issue:

> Whether petitioner is entitled to relief of any kind in this case in the absence of Board action to employ her as a teaching staff member.

The Board moved for a summary decision February 23, 1990 on the facts stipulated in the matter. Petitioner's letter brief in opposition to the Board's motion was filed April 10, 1990.

The conclusion is reached in this initial decision that petitioner fails to state a cause of action under Education Law, N.J.S.A. 18A:1-1, et seq. and that therefore the Board is entitled to summary decision by way of a dismissal of the matter.

STIPULATION OF FACT

For purposes of the Board's motion for summary decision the alleged facts set forth in the petitioner's complaint are admitted. Those asserted facts are as follows:

> Solely for this Motion of Summary Judgment, and for no other purpose, the following facts, as set forth in Plaintiff's Complaint, shall be admitted:
>
> Defendant, Holmdel Township Board of Education, has offices located at 4 Crawfords Corner Road, Township of Holmdel, County of Monmouth and State of New Jersey.
>
> Defendant, Holmdel Township Board of Education, pursuant to N.J.S.A. 18A:1-1, et seq., has been appointed to operate the school system in Holmdel Township and as such has the authority to hire teachers and other individuals to work in the Holmdel Township school system.
>
> On or around September 4, 1988, defendant, Holmdel Township Board of Education, placed an advertisement in the Newark Star Ledger requesting that individuals apply for the job of Substance Abuse Counselor and listed no specific qualifications for said position.

Plaintiff, upon seeing said advertisement, applied to the Holmdel Township Board of Education for the position of Substance Abuse Counselor.
During the period commencing September 19, 1988, and ending October 27, 1988, plaintiff had several interviews with representatives and employees of defendant, Holmdel Township Board of Education.

On or around October 27, 1988, plaintiff was contacted by defendant, Timothy C. Brennan, acting in his capacity as Superintendent of Schools in Holdmdel Township on behalf of defendant, Holmdel Township Board of Education, who offered the job of Substance Abuse Counselor to plaintiff and that she was to start on December 1, 1988.

In reliance upon the offer by defendant, Holmdel Township Board of Education, plaintiff notified her employer at that time, Jersey Shore Addicition Services, Asbury Park, New Jersey, that she would begin employment with Holmdel Township Board of Education commencing December 1, 1988.

On or around November 17, 1988, defendant, Timothy C. Brennan, on behalf of defendant, Holmdel Township Board of Education, notified plaintiff that the Board of Education had decided to change the requirements of the Substance Abuse Counselor position and, therefore, plaintiff was no longer being considered for the position.

Plaintiff relied upon the offer of defendant, Holmdel Township Board of Education, to her detriment in that she informed her employer at the time of the offer and said employer replaced plaintiff based upon her giving notice to said employer.

Plaintiff has sustained damages as a result of her reliance upon the offer of the defendant, Holmdel Township Board of Education, since she has not been employed since December 1, 1988, and has not received compensation from her employer, medical benefits and other benefits of employment.

Plaintiff, through her attorneys, notified defendant, Holmdel Township Board of Education, of its wrongful rescission of its offer on November 23, 1988, by way of correspondence.

Nevertheless, defendant, Holmdel Township Board of Education, continued to refuse to honor its offer upon which plaintiff relied, and subsequently hired a new Substance Abuse Counselor.

At all times pertinent to this complaint, defendant, Timothy C. Brennan, was Superintendent of Schools in the Township of Holmdel.

On or about September 19, 1988, defendant, Timothy C. Brennan, interviewed plaintiff for the position of Substance Abuse Counselor in the Township of Holmdel.

On or around October 27, 1988, defendant, Timothy C. Brennan, notified plaintiff that she was hired as Substance Abuse Counselor in the Township of Holmdel and was to commence employment as of December 1, 1988.

Based upon the offer of defendant, Timothy C. Brennan, plaintiff notified her employer at that time, Jersey Shore Addiction Services, that she had accepted a new position and would be leaving its employ.

Based upon said notification, Jersey Shore Addiction Services employed another individual to assume plaintiff's position.

Defendant, Timothy C. Brennan, rescinded the offer of employment to plaintiff on or around November 17, 1988.

Plaintiff relied upon the offer of defendant, Timothy C. Brennan, to her detriment.

It is also admitted that the Holmdel Township Board of Education never voted to hire plaintiff and never took any action on her job application.

Petitioner agrees that the foregoing facts are stipulated for purposes of the motion for summary decision.

BOARD'S ARGUMENT

The Board's central point in support of its motion for summary decision by way of dismissal of the matter is that only a board of education has statutory authority to enter into a contract of employment with a teaching staff applicant and offers or promises by the superintendent of schools or any other employee will not and cannot override that statutory mandate. The Board in this regard relies upon prior decisions of the Commissioner, particularly Ann Brennan v. Board of Ed. of the City of Pleasantville, 77 S.L.D. 1059, wherein Brennan, who had applied for a teaching position with the Pleasantville Board, was told on two separate occasions by the assistant superintendent that the job was hers and that board approval was merely a formality which would be discharged at a subsequent board meeting. Beyond receiving such assurances from the assistant superintendent, Ms. Brennan also received information regarding an orientation meeting for new teachers prior to the official opening of school; she received a copy of a

general announcement to teachers which advised that she would be teaching special education; she received a teaching schedule and room assignment; and she was introduced at the new faculty orientation meeting as a new faculty member. On the very same day Ms. Brennan was advised by the assistant superintendent that she did not have the position of special education teacher for that school year. After having filed a petition of appeal to the Commissioner by which she demanded an order directing the board to place her on its staff, the board defended on the grounds that it alone has statutory authority to employ teaching staff members and that because it took no action to employ her the petition failed to state a cause of action. The Commissioner agreed with the board and held as follows:

> In support of its Motion to Dismiss the Petition of Appeal, the Board asserts that inasmuch as no written contract between petitioner and the Board is alleged in the Petition of Appeal, the Petition should be dismissed for failure to set forth a cause of action. The Board relies upon N.J.S.A. 18A:27-5 which reads:
>
> 'Every contract between a board of education which has not made rules governing such employment and any teaching staff member shall be in writing, in triplicate, signed by the president and secretary of the board of education and by such person.'
>
> It is argued that only the Board has statutory authority to enter into a contract of employment with its teaching staff applicants and no agent or employee of the Board may usurp that authority.
>
> The thrust of petitioner's argument is grounded in the equitable doctrine of estoppel. Petitioner alleges that she relied, to her great detriment, upon the representations and conduct of the Board's representative which caused her to forsake an offer of employment elsewhere. Petitioner calls upon the Commissioner to exercise his equitable powers and right the condition in which she finds herself through no fault of her own, and cites Elizabeth Rockstein v. Board of Education of the Borough of Jamesburg, 1974 S.L.D. 260, 1975 S.L.D. 191, aff'd State Board 199, aff'd Docket Nos. A-3916-74, A-4011-74 New Jersey Superior Court, Appellant Division, July 1, 1976 (1976 S.L.D. 1167) and Juanita Zielenski v. Board of Education of the Town of Guttenberg, 1970 S.L.D. 202, rev'd State Board 1971 S.L.D. 664, aff'd Docket No. A-1357-70 New Jersey Superior Court, Appellate Divison , February 16, 1972 (1972) S.L.D. 692) as matters in which the Commissioner has previously utilized his authority to mold an equitable remedy to correct an injustice.
>
> Petitioner asserts that where a

"***municipal body has the legal authority to do an act which it refuses to do -- and where someone dealing with that body has through good faith relied on representations of that body [and] had (sic) been damaged -- the law will require the public body to do the act or preclude it from denying that it has done the act.***"

In support of her argument, petitioner cites Hankin v. Hamilton Township Board of Education, 47 N.J. Super. 70 (App. Div. 1957), cert. denied 25 N.J. 489 (1957); Palisades Properties, Inc. v. Brunetti, 44 N.J. 117 (1965); Summer Cottagers' Ass'n of Cape May v. City of Cape May, 19 N.J. 493 (1955).

Finally, petitioner argues that the Board's representatives were cloaked with the authority to do that which they did, that their actions should be attributed to the Board, and that the Board should be bound.

The Commissioner cannot agree that the Board is estopped from asserting that no contract of employment existed between it and petitioner. The law is clear that boards alone can appoint teaching staff members.

> "No teaching staff member shall be appointed except by a recorded roll call majority vote of the full membership of the board of education appointing him."
> N.J.S.A. 18A:27-1.

An examination of the record reveals that the Board committed itself not at all of petitioner, but that petitioner mistakenly relied on the opinions and assurances of the Board's administrators in concluding that a commitment had been made. Such reliance was misplaced, since opinions and assurances cannot stand in the stead of deliberate Board action. The Board alone has the ultimate authority to decide the employment of its teaching staff members. Harold A. Vandenbree v. Board of Education of the School District of Wanaque, 1967 S.L.D. 4, aff'd State Board January 3, 1968; Charles Gersie v. Board of Education of the City of Clifton, Passaic County 1972 S.L.D. 462. As was previously stated in Esther Boyle Eyler et al v. Board of Education of the City of Paterson, et al., 1969-60 S.L.D. 68, 71:

"***By the terms of N.J.S.A. 18:6-20 [now N.J.S.A. 18A:25-1 and 27-1], the appointment, transfer or dismissal of principals and teachers and the fixing of their salaries require a majority vote of the whole number of members of the board.*** It is the opinion of the Commissioner that any action under this statute should be taken by a recorded roll call majority vote of the full membership of the board of education in a public meeting of the Board properly called. It is well established that boards of education may not delegate the appointment of school personnel to committees or school officials. Cullum vs. Board of Education of North Bergen,

15 N.J. 285 (1954). Taylor vs. Board of Education of Hoboken, 1938 S.L.D. 54 and 55. It is also well established that full compliance with the statutory requirements to the formalities of employment is essential to the validity of such employment. McCurdy vs. Matawan, 1938 S.L.D. 298 at 299. Also LaRose vs. Egg Harbor City, 1938 S.L.D. 377; Valente vs. Board of Education of Hoboken, 1950-51 S.L.D. 57; Landrigan vs. Board of Education of Bayonne, 1955-1956 S.L.D. 91.***"

An early case considering the issue of recovery for the rendering of teaching services under an unauthorized contract was William Hibbler v. Board of Education of the Township of Dover, 1939-1949 S.L.D. 1, 2 (1940), wherein the Commissioner stated:

"***A person dealing with a public officer is assumed to know the limitations of the officer's legal authority. Accordingly, the petitioner is assumed to know that the Supervising Principal could not employ him and make such employment binding upon the board of education.***"

Applying this principle to the matter herein, it stands to reason that petitioner likewise was not bound under the circumstances, but was free to negotiate with any other board of education in need of the services of a special education teacher.

Based upon the foregoing, the Commissioner finds and determines that no contract of employment was offered to, or existed between, Anna Brennan and the Board of Education of the City of Pleasantville for the school year 1975-76. Accordingly, for the reasons stated, respondent's Motion to Dismiss is granted and the Petition herein is dismissed." at 1060-1062.

The Board also cites a more recent decision of the Commissioner, Deborah Abrahamsen v. Middletown Township Board of Ed., 1989 S.L.D. - (May 1, 1989) which affirms the principal only boards of education have the authority not the school administrators, to make that final judgment with respect to the employment of personnel to be employed in its schools.

PETITIONER'S ARGUMENT IN OPPOSITION

Petitioner points out that neither the Brennan case nor other cases cited by the Board are controlling in this matter because the facts contained therein are distinguishable from the facts in this case. In this regard, petitioner notes that her dispute with the Board does not involve a breach of contract action; rather the issue is

whether she reasonably relied upon the offer of employment made by respondent Brennan to her detriment. Petitioner contends that the facts show she placed reasonable reliance on the offer of employment by Superintendent Brennan and asserts that a misrepresentation was made to her by Brennan upon which she reasonably relied to the extent she resigned her other employment in order to accept the offer she believed was made in good faith. Petitioner analogizes the facts in this case to equitable fraud because having no prior experience as teaching staff member in a board of education's employ she was induced by the superintendent to believe that when the offer was made and she accepted the offer that a contract was formed.

Petitioner opposes the Board's motion for summary judgment and demands the opportunity to establish detrimental reliance damages upon the superintendent's offer.

ANALYSIS

It must be kept in mind that regardless whether the Board sees the issue in this case as a claimed breach of implied contract or, as petitioner asserts, the issue is one of detrimental reliance and damages flowing therefrom, the plain statutory fact is only a board of education has the authority to appoint teaching staff members. Specifically, N.J.S.A. 18A:27-1 provides in full:

> No teaching staff member shall be appointed, except by a recorded roll call majority vote of the full membership of the board of education appointing him.

To be sure, the facts in this case tend to show petitioner did rely upon what she believed to be a good faith offer of the superintendent to commence employment in the Holmdel Township Public Schools and based on that offer she resigned her then-present employment the fact is that under N.J.S.A. 18A:6-9 the Commissioner of Education has no authority to award damages of any kind against a board of education absent proof that a contract, with all its statutory formalities, has been created between the petitioning party and that board. In this case, the facts demonstrate that the Board took no action whatsoever to engage petitioner as a teaching staff member in its employ.

School law as interpreted by the Commissioner on prior occasions is clear and not open to debate. Damages are available to a petitioning party against a board of

education only if there is a contract of employment entered into between that party and the affected board. Absent an employment contract pursuant to law entered into by the affected board, no cause of action exists against it. That being so, the Board's motion for summary decision must be granted.

The petition of appeal is **DISMISSED.**

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

April 19, 1990
DATE

Daniel B. McKeown
DANIEL B. MC KEOWN, ALJ

Receipt Acknowledged:

4/20/90
DATE

Seymour Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

APR 23 1990
DATE

Jayne LaVenia
OFFICE OF ADMINISTRATIVE LAW

tmp

JOAN R. VERNON,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY AND TIMOTHY C. BRENNAN,	:	DECISION
RESPONDENTS.	:	

The record and initial decision rendered by the Office of Administrative Law have been reviewed. Petitioner filed timely exceptions pursuant to the applicable provisions of N.J.A.C. 1:1-18.4.

Petitioner's exceptions recite verbatim the stipulated facts as set forth in the Initial Decision at pages 2-4. Thereafter, she reiterates her position that such "***facts constitute an action against the defendant for promissory estoppel and detrimental reliance for the reasons set forth in the enclosed Petitioner's memorandum of law." (Exceptions, at p. 3) She seeks reversal of the initial decision rendered by the Honorable Daniel B. McKeown, ALJ.

Upon a careful and independent review of the record of this matter, including petitioner's exceptions, the Commissioner agrees with the findings and the conclusions of the Office of Administrative Law that absent a resolution by a board of education establishing that a contract of employment has been entered into between the parties, no cause of action exists against it.

A review of the exceptions indicates that the arguments proffered therein are a reiteration of those arguments presented by petitioner's counsel in his Memorandum of Law in Opposition to Defendants' Motion for Summary Decision. The exceptions offer no new facts or arguments. Upon review of said submissions, the Commissioner is convinced that the ALJ fully and fairly disposed of such contentions in the initial decision. Said arguments are thus deemed to be without merits for the reasons explicated by the ALJ below.

In so concluding, however, the Commissioner would correct what appears to be a poor choice of words in the last sentence on page eight of the initial decision wherein the ALJ states:

> Damages are available to a petitioning party against a board of education only if there is a contract of employment entered into between that party and the affected board. (emphasis supplied)

A better word choice might have been "Relief," instead of "Damages." While it is within the Commissioner's power to direct that an individual be made whole where there is a demonstration that his or her rights have been infringed, he has no authority to direct damages pursuant to his authority to hear and adjudicate matters arising under school laws. N.J.S.A. 18A:6-9

Accordingly, the Commissioner accepts the recommendation of the Office of Administrative Law granting the Board in this case Summary Decision. He adopts the initial decision as the final decision in this matter for the reasons expressed therein.

COMMISSIONER OF EDUCATION

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

INITIAL DECISION
OAL DKT. NOS. EDU 9722-89
(EDU 3078-89, REMANDED) and
EDU 216-90
AGENCY DKT. NOS. 62-4/89 and
359-11/89

JOSEPH ENTWISTLE,
Petitioner,
v.
BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE,
Respondent.

Joseph K. Entwistle, petitioner, pro se

Stephen J. Mushinski, Esq., for respondent (Mushinski & Andronici, attorneys)

Record Closed: March 20, 1990 Decided: April 18, 1990

BEFORE **BRUCE R. CAMPBELL**, ALJ:

PROCEDURAL HISTORY

The petitioner filed his first petition of appeal with the Commissioner of Education (Commissioner) on April 3, 1989. The Florence Township Board of Education (Board) answered on April 20. The matter was transmitted to the Office of Administrative Law, pursuant to N.J.S.A. 52:14B-1 et seq. and N.J.S.A. 52:14F-1 et seq., on April 26.

The administrative law judge (ALJ) then assigned held a prehearing conference, by telephone, on July 11. The ALJ set the matter down for hearing on November 6, at the Office of Administrative Law, Trenton. The case was reassigned to me. The parties appeared before me at the appointed date and time.

When the record opened, the Board moved to dismiss on the ground that the petition was untimely. The petitioner argued against the motion. On November 9, I issued an initial decision in favor of the Board and dismissing the petition.

On December 20, the Commissioner remanded, finding that the petitioner should have the opportunity to try to show that certain Board actions were not made public within a reasonable time and that certain meeting notices were inadequate or inaccurate or both.

On January 10, 1990, the Department of Education transmitted a second petition of appeal. Upon review of the second petition, I found that it deals with the same subject matter and parties as the first. Accordingly, I ordered the matters consolidated on February 7.

The matter was set down for and was heard on February 22, at the Office of Administrative Law, Trenton. Subsequent to hearing, the Board moved for partial summary judgment and the petitioner timely responded.

THE CHARGES

The petitioner alleges the Board failed to provide adequate notice, as defined and required by N.J.S.A. 10:4-8 and 4-9, of its January 4, January 12 and February 1, 1989 meetings; that the Board failed in its minutes of those meetings to specify the time, place and manner in which notice was provided or why notice was not provided per N.J.S.A. 10:4-10; that the Board failed to keep reasonably accurate minutes; that the Board failed to timely make public its minutes, and the petitioner generally repeats these charges, in his second petition, as to regular Board meetings of October 16 and November 13, 1989 and special meetings of November 17 and 20, 1989.

JURISDICTION

N.J.S.A. 10:4-15 provides that the Superior Court is the forum in which to bring a proceeding to void an action taken by a public body at a meeting that does not conform with the provisions of the act. The statute is clear that the proceeding may be brought by any person and equally clear that it must be brought within 45 days after the action complained of has been made public. In Sukin v. Northfield Bd. of Ed., 171 N.J. Super. 184 (App. Div. 1979), the court held that the act does not confer exclusive jurisdiction in the Law Division or Chancery Division of Superior Court. Rather, when an administrative agency has primary jurisdiction to determine the underlying controversy, as the Commissioner of Education has here, the agency properly may determine issues arising under the Open Public Meetings Act.

Jurisdiction in this matter resides in the Commissioner of Education by operation of N.J.S.A. 18A:6-9, which provides that the Commissioner has complete power to hear and determine all controversies and disputes arising under the school laws, and the Sukin decision.

PAROL AND DOCUMENTARY EVIDENCE

The petitioner testified that the required 48-hour notice was not given for the Board's January 12, 1989 meeting. The notice of meeting was published in the Burlington County Times on January 11, 1989 (P-10). The notice that was published on January 11 appeared in the Burlington County Times only.

Notice of the Board's January 4, 1989 meeting appeared on that day in the Burlington County Times (P-8). The notice states the meeting will be closed to the public, no action will be taken and the purpose of the meeting is to discuss legal matters. Petitioner testified that the Board's counsel was not present at that meeting.

Petitioner showed that he paid to receive copies of the Board minutes per Board policy (P-6). However, he received minutes of the January 12, 1989 meeting 48 days later and minutes of the February 1, 1989 meeting 52 days later (P-12a).

Petitioner alleges that the Board failed to enter the time, place and manner of notice at or near the beginning of minutes of its January 4, January 12 and February 1,

1989 meetings. Opening statements failed to state specifically the time, place and manner of adequate public notice (P-9, P-11, P-12). Furthermore, the public notice of the January 4, 1989 meeting does not correctly state the purpose of the meeting.

Minutes of the January 12, 1989 meeting (P-12) are not an adequate representation of what went on at the meeting. Petitioner was present, he made comments and he asked questions. None of this shows in the minutes. The minutes should not exclude any significant portion of the meeting.

Because petitioner received the minutes of the February 1, 1989 meeting after candidates night, March 21, 1989, he could not use them in his candidates night presentation.

The petitioner also stated he received minutes of the October 16, 1989 meeting 33 days after the meeting was held (P-19, P-19a). Similarly, minutes of the November 13, 1989 meeting were not received until December 8 (P-20). Minutes of the October 3, October 10, October 11, October 12, October 14, October 25 October 26, and November 13, 1989 meetings were all received on December 12, 1989.

Minutes of the November 20 meeting (P-20) refer to a closed discussion, the essence of which would be disclosed when the need for confidentiality no longer existed. Inasmuch as this dealt with hiring a superintendent, it should have become "open business" as soon as a superintendent was hired. The same minutes refer only to publication of a meeting notice in the Burlington County Times.

The petitioner did not know when the Board approved its January and February 1989 meeting minutes. He maintains that, as a result of these meetings, public monies were spent (R-1, R-2).

The petitioner also testified that he forwarded his first petition in this matter to the Commissioner of Education on March 31, 1989, the Commissioner receiving it on April 3.

The Board Secretary testified that she has held her position since September 27, 1987. She attended the January 12, 1989 meeting and created the minutes thereof. Special meetings are not always tape recorded. In any event, tapes are reused.

Although the witness recalled the petitioner and one other person being present at the meeting, she had no recall of the petitioner speaking at the meeting.

The witness testified extensively about her responsibility for advertising meetings and preparing minutes. Board meetings are advertised as soon as the reorganization meeting is held in April. The schedule of regular meetings for the year is then placed in three newspapers and posted in the Florence Township Municipal Building. Special meetings are advertised in the Burlington County Times because it is the most accessible medium. The Secretary usually hand-delivers notices to that newspaper.

The Secretary testified to eight or ten instances in 1988 in which publication of the meeting notice preceded the meeting by more than 48 hours. The regular meeting of December 12, 1988 had been advertised in April 1988 in all three newspapers circulating in the area.

Concerning the January 4, 1989 special meeting, the witness stated there was not enough time to mail notice to the newspapers. The witness was on vacation during the holiday week December 26-30, 1988. On January 3, 1989, she took notice of the special meeting to the Burlington County Times before noon. The meeting was a closed meeting with a New Jersey Department of Education representative. She put "legal matters" in the notice based on her belief of what the meeting entailed. No action was taken at the meeting; it was for information purposes only. She learned of the January 4 meeting, so placed because of availability of the Department of Education representative, on January 3.

The Secretary learned on January 9 that there would be a special meeting on January 12, 1989. She had insufficient time to advertise the meeting. She hand-carried a notice by noon on January 10 to the Burlington County Times and took or mailed a copy of the notice to the News-Register. Minutes of that special meeting show no action to pay any monies (P-12). The meeting dealt with site approval. A consultant's plan was approved by the Board and the Board authorized the consultant to go forward on an existing contract for services. The Secretary took the minutes of the meeting, the petitioner was present, the meeting was not tape recorded, and minutes were based on her notes. She has no recall of the petitioner making comments and would have no reason to exclude his comments.

Minutes of the January 4 and January 12 meetings were approved by the Board on February 13 (R-11). They were available to the public as soon as approved; that is, on the next business day. The petitioner did not come to Board offices for copies of the minutes, although he could have received copies that soon after the approval.

On one of the last days in January 1989, the Secretary learned there would be a special meeting on February 1. She took a copy for a notice of the meeting to the Burlington County Times by noon on January 30. Minutes of the meeting show no authorization to expend monies (P-18).

The secretary stated that the petitioner deposited $10 with the Board in December 1988 to cover costs of reproduction and mailing of Board minutes for the 1988-89 school year. The secretary gave him those minutes that had been prepared through that date, but advised the petitioner she would not send future minutes until the Board approved the procedure. The Board did accept and adopt this practice. The secretary then informed the petitioner and, as the exhibits show, began mailing him minutes as they were approved.

The Open Public Meetings Act statement read by the presider at the beginning of all regular Board meetings was introduced (R-12) as was the statement read by the presider at the beginning of all special meetings (R-13). The secretary believed the Board was complying with the law to have these statements read at the beginning of each meeting, but until recently did not spell out the statements in full in the minutes.

Concerning candidates night in March 1989, the witness stated she sent minutes to the petitioner as soon as possible. There was no intent to keep minutes from him. She placed copies of minutes in the mail to the petitioner as soon as the Board approved them. The minutes go with regular Board mail. Minutes of the October 16, 1989 meeting were approved by the Board on November 13 and mailed on November 14. Minutes of the November 13, 1989 meeting and several special meetings went out on December 6.

The secretary's current practice is to try to have minutes out in two weeks, prior to Board approval. They are so identified. The Board accepts and endorses this practice. Record of Board correction and acceptance presumably appears in subsequent minutes.

The secretary testified that she is aware a statement must appear in the minutes if adequate notice of the meeting has not been given.

MOTION FOR PARTIAL SUMMARY JUDGMENT

The Board states the original petition in this matter was filed on April 3, 1989. The petition challenges the validity of notices of meetings dated January 4, January 12 and February 1, 1989. The minutes of the January 4 and January 12, 1989 meetings were approved by the Board on February 13, 1989 (R-11).

As a result of that approval, the minutes became immediately available to the public and a matter of public record. Any action with respect to the validity of those meetings would have had to be filed on or before the expiration of 45 days from February 13, 1989. The petition was filed 49 days after approval of the minutes.

The petition with respect to the meetings of January 4 and 12, 1989 is untimely. The Commissioner has so ruled in McWilliams v. Bridgewater-Raritan Bd. of Ed., 1980 S.L.D. 1439 and Lucia v. Burlington Cty. Vocational and Tech. School, OAL DKT. EDU 1002-82 (Nov. 28, 1983), adopted Comm'r of Ed. (Jan. 12, 1984).

The minutes subject to challege here were made public on February 13, 1989. Consequently, even though the petitioner may not have received the minutes within the 45-day period, the matters were of public record and indeed were made public as defined in the Open Public Meetings Act.

Pursuant to N.J.S.A. 10:4-15, which sets forth the 45-day limit and the clear case law on the subject, the Board requests partial summary judgment in its favor, dismissing all allegations and complaints with respect to the meetings of January 4 and 12, 1989.

I **FIND** the petitioner did not receive minutes of the January 4, 1989 meeting until July 1989. This is established by uncontroverted testimony. I **FIND** the petitioner has established that he received minutes of the January 12, 1989 meeting on March 1, two days after they were posted to him by the Board secretary. Inasmuch as the petitioner and the Board had entered an agreement under which the Board would supply minutes to

the petitioner for the 1988-89 school year and inasmuch as the petitioner had deposited $10 to cover reasonable costs of the procedure, I **FIND** no reason why the minutes should not have reached the petitioner sooner than March 1. I **CONCLUDE** that an action or inaction of a Board agent caused the petitioner to receive the minutes 16 days after they were approved. Therefore, I further **CONCLUDE** that the petition is not untimely as to these minutes. Accordingly, the motion for partial summary judgment is **DENIED.**

DETERMINATION

From the credible evidence, I FIND:

1. The Florence Township Board of Education failed to give adequate notice of its January 4, January 12 and February 1, 1989 meetings. N.J.S.A. 10:4-8(d).
2. The Board failed until late 1989 or early 1990 to publish in full in its minutes the statement of compliance with the Open Public Meetings Act required by N.J.S.A. 10:4-10(a) or (b).
3. The Board failed on at least 11 occasions between January 4 and October 26, 1989 to timely make public its minutes.
4. The Board has adopted a practice of disseminating minutes - clearly marked as draft or unapproved minutes - approximately two weeks after a meeting. Minutes subsequently are approved or amended and approved and entered into the Book of Minutes.
5. The proofs are in equipoise as to whether the Board failed to keep reasonably accurate minutes. Accordingly, this charge fails for want of a preponderance of the credible evidence in the record.

It is the obligation of every public body governed by the Open Public Meetings Act, when preparing calendars and sending notices of meetings, to fix dates, except in emergency situations, that permit the required notice to be given. The public body must bear in mind newspaper publication dates and use only such newspapers for notice purposes as have the ability to publish notices at least 48 hours in advance of meeting dates. Worts v. of Upper Tp. 176 N.J. Super. 78 (App. Div. 1980). When a public body sends meeting notices to a newspaper for publication and knows that the newspaper cannot publish the notice at least 48 hours in advance of the meeting, there is no compliance with the Open Public Meetings Act. Ibid.

A public body has an affirmative duty created by the Open Public Meetings Act to use its resources to meet the objective of those provisions requiring adequate notice of at least 48 hours to the public. Jenkins v. Newark Bd. of Ed., 166 N.J. Super. 357 (Law Div. 1979), aff'd 166 N.J. Super. 300 (App. Div. 1979).

Any closed meetings must be valid under a recognized exception to the Open Public Meetings Act or any action taken, if not cured, is voidable. N.J.S.A. 10:4-15; Serra v. Mountainside, 188 N.J. Super. 134 (Law Div. 1983).

The January 4, 1989 special meeting was not adequately noticed. No action was taken at the meeting and, therefore, there is nothing to cure or to void. The petitioner's contention that absence of Board counsel at the meeting somehow makes it impossible for the Board to have discussed legal matters must be rejected as without basis in logic or experience. While I **FIND** and **CONCLUDE** that there is nothing to be set aside, the question of whether the meeting was appropriately closed is addressed below.

The special meeting of January 12, 1989 was not adequately noticed. The petitioner maintains that as a result of actions taken at this meeting, public monies were spent (R-1, R-2) and these actions should be voided. The exhibits show, however, that the Board had let contracts to two consulting firms in 1988. The minutes established that the consultants presented status reports. The minutes do not reflect any authorization to expend public monies. I **FIND** and **CONCLUDE** that there is nothing to be set aside.

Similarly, the special meeting of February 1, 1989 was not adequately noticed. Again, reports from consultants were received but no expenditures were authorized (P-18). There was, however, discussion concerning restoration of some maintenance items to the budget for the 1989-90 school year. While it is true that no action was taken, this is precisely the kind of thing the Open Public Meetings Act, commonly called the Sunshine Law, intends to place in the sunshine. I **FIND** and **CONCLUDE** that there is nothing to be set aside. I also **FIND** and **CONCLUDE** that the public deserves adequate notice of budget discussions.

The failures to comply with the Open Public Meetings Act noted above are not such as require the setting aside of any Board action. Neither are they de minimis. There was no valid reason brought forth requiring that the January 4, 1989 be a closed

session. The discussion of legal aspects of lease purchase arrangements is not the type of discussion contemplated by N.J.S.A. 10:4-12(b)(7). A borough council's discussion of anticipated litigation before the State Division of Tax Appeals with respect to appeals of adverse determinations in tax assessment matters was within the exception of the Open Public Meetings Act providing for closed sessions for discussion of pending or anticipated litigation. Houman v. Mayor & Coun. of Bor. of Pompton Lakes, 155 N.J. Super. 129 (Law Div. 1977). An exception to the Sunshine Law authorizing a public body to meet in private to discuss pending anticipated litigation did not apply to a meeting at which a borough board of adjustment discussed neither matters covered by the attorney-client privilege nor those related to an actual pending or anticipated litigation but merely discussed the merits of an application before it. Accardi v. Mayor & Coun. of City of No. Wildwood, 145 N.J. Super. 532 (Law Div. 1976). The discussion the Board held on January 4, 1989 was not of matters covered by the attorney-client privilege or relating to an actual pending or anticipated litigation. The meeting did not qualify for the statutory exception.

Failure to publish in full the statement of compliance with the Open Public Meetings Act required by N.J.S.A. 10:4-10(a) or (b) is not condoned, but it is not fatal to any actions taken at Board meetings of October 16, November 13, November 17 and November 20, 1989 because it has not been shown that the notices themselves were defective. Cf., Precision Industrial Design Co. v. Beckwith, 185 N.J. Super. 9 (App. Div. 1982), certif. den. 91 N.J. 545 (1982).

SUMMARY

This opinion has found:

1. The Florence Township Board of Education failed to give adequate notice of its January 4, January 12 and February 1, 1989 meetings. N.J.S.A. 10:4-8(d).

2. The Board failed until late 1989 or early 1990 to publish in full in its minutes the statement of compliance with the Open Public Meetings Act required by N.J.S.A. 10:4-10(a) or (b).

3. The Board failed on at least 11 occasions between January 4 and October 26, 1989 to timely make public its minutes.

4. The Board has adopted a practice of disseminating minutes - clearly marked as draft or unapproved minutes - approximately two weeks after a meeting. Minutes subsequently are approved or amended and approved and entered into the Book of Minutes.

5. The proofs are in equipoise as to whether the Board failed to keep reasonably accurate minutes. Accordingly, this charge fails for want of a preponderance of the credible evidence in the record.

This opinion also has found there were no actions taken at those meetings that should be set aside because in the instances of inadequately noticed meetings no actions were taken and in the instances of failure to publish in full the compliance statements the underlying meeting notices were not defective.

REQUESTS FOR PENALTIES

The petitioner asks the Commissioner of Education to void any Board action taken at any meeting he challenges. Each meeting has been addressed and no cause found to set aside actions, if any were taken. The petitioner also asks for penalties against the Board under N.J.S.A. 10:4-17. That section provides:

> Any person who knowingly violates any of the foregoing sections of this Act shall be fined $100.00 for the first offense and no less than $100.00 nor more than $500.00 for any subsequent offense, recoverable by the State by a summary proceeding under the "Penalty Enforcement Law" (N.J.S. 2A:58-1 et seq.). The county district court of the county in which the violation occurred shall have jurisdiction to enforce said penalty upon complaint of the Attorney General or the county prosecutor, but the Attorney General or county prosecutor may refer the matter to the Public Advocate . . . .

The statute specifies that the Attorney General, a county prosecutor or, upon reference from one of them, the Public Advocate may bring actions for penalties. The statute does not authorize the Commissioner of Education or a private citizen to act as a prosecutor seeking imposition of penalties. Because the Office of Administrative Law draws authority and jurisdiction from the agencies for which it hears cases, neither is the Office of Administrative Law authorized to establish and enforce penalties. The Commissioner of Education enjoys broad powers in education matters. Sukin, above; Bd. of Ed., E. Brunswick v. Tp. Council, E. Brunswick, 48 N.J. 94 (1966). However, the Commissioner has refrained from trying to impose penalties unless the Legislature clearly

has given such authority. In this case, the Legislature has not. Dougherty v. Rancocas Valley Reg'l High School Bd. of Ed., OAL DKT. EDU 6731-82 (Nov. 22, 1982), aff'd Comm'r of Ed. (Jan. 6, 1983).

I **FIND** and **CONCLUDE** there is no basis on which either this tribunal or the Commissioner of Education can entertain an application for penalties.

ORDER

Although no Board actions have been set aside and there is no authority to impose penalties, the violations found still must be addressed. First, the Board is reminded that strict compliance with all applicable laws and regulations is the minimum standard, not the maximum, to which the Board must hold itself. Second, if a meeting cannot be adequately noticed to the public, it should not be held unless there is a bona fide necessity consistent with the requirements of N.J.S.A. 10:4-9. Third, N.J.S.A. 10:4-14 requires public bodies to keep reasonably comprehensible minutes of all meetings. The minutes must show the time and place of meeting, members present, subjects considered, actions taken, the vote of each member and any other information required by law. Further, the minutes "shall be promptly available to the public to the extent that making such matters public shall not be inconsistent with [N.J.S.A. 10:4-12]."

As the Commissioner has stated, minutes need not and, in fact, should not be verbatim records of meetings. Aside from the resolutions of action and the votes thereon, minutes need only summarize the discussions surrounding the actions. Ehrhardt v. Watchung Hills Reg'l High School Bd. of Ed., 1959-60 S.L.D. 196.

The enactments of the Legislature are to be adhered to assiduously. Orlando v. Bd. of School Estimate and Bd. of Ed., OAL DKT. EDU 4550-83 (July 23, 1984), aff'd Comm'r of Ed. (Sept. 6, 1984).

The Florence Township Board of Education and its agents shall review and shall comply scrupulously with the provisions of the Open Public Meetings Act. It is so **ORDERED**. In all other respects, the petition of appeal is **DISMISSED**.

This recommended decision may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. However, if Saul Cooperman does not so act in forty-five (45) days and unless such time limit is otherwise extended, this recommended decision shall become a final decision in accordance with N.J.S.A. 52:14B-10.

I hereby **FILE** my Initial Decision with **SAUL COOPERMAN** for consideration.

18 APRIL 1990
DATE

Bruce R. Campbell
BRUCE R. CAMPBELL, A.J.J.

Receipt Acknowledged:

4/19/90
DATE

Simon Weiss
DEPARTMENT OF EDUCATION

Mailed To Parties:

DATE APR 24 1990

Jayne La Velle Jones
OFFICE OF ADMINISTRATIVE LAW

km

JOSEPH ENTWISTLE,	:	
PETITIONER,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF FLORENCE, BURLINGTON COUNTY,	:	DECISION
RESPONDENT.	:	

The record of this consolidated matter and the initial decision of the Office of Administrative Law have been reviewed. No exceptions were filed by the parties.

Upon careful consideration, the Commissioner concurs with the ALJ that the Florence Township Board of Education on numerous occasions violated the provisions of the Open Public Meetings Act (OPMA) governing adequate notice, statement of compliance, and/or timely publication of minutes. He further concurs that, despite these violations, there is no basis for setting aside any actions of the Board either because no vulnerable actions were taken at the contested meetings or because, in the case of statements of compliance, the underlying notices were not defective. The Commissioner likewise concurs that his authority does not extend to imposition of the monetary penalties sought by petitioner.

Nonetheless, the Commissioner agrees with the ALJ that the violations demonstrated by petitioner in this matter cannot be characterized as de minimis, and he emphatically observes that the absence of monetary penalty or voiding of Board action in this instance should not be construed as an indication that he views such violations lightly. On the contrary, even when deliberate intent to circumvent the law appears not to have been a motivating factor, practices such as those brought to light through this action must be censured because they compromise the public's rightful ability to participate in the school governance process and at the very least can serve to foster cynicism and undermine confidence in the Board.

Accordingly, the initial decision of the Office of Administrative Law is affirmed for the reasons well stated therein. The Florence Township Board of Education is directed to assiduously review its policies and procedures in view of the violations found through this proceeding and to ensure that all future actions by the Board and its agents are in full compliance with the Open Public Meetings Act.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

State of New Jersey
OFFICE OF ADMINISTRATIVE LAW

SOLOMON A. METZGER
ADMINISTRATIVE LAW JUDGE

CN 049
QUAKERBRIDGE PLAZA, BLDG. #9
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April 30, 1990

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RE: **C.R.R. AND A.R. v. BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL**
OAL DKT. NO. EDU 3142-90; AGENCY DKT. NO. 85-4/90

Dear Parties and Counsel:

This letter will serve in lieu of a formal opinion and order in the above-captioned matter. The Office of Administrative Law received the Department of Education's transmittal of petitioners' motion for emergent relief on April 25, 1990. The matter was heard on Friday, April 27, 1990. Neither party presented affidavits; there were some undisputed representations made and argument heard.

C.J.R. is petitioners' minor son who is a senior in attendance at respondent's high school. He was charged with being under the influence of alcohol on March 13, 1990, while at an after-school baseball practice. His punishment consisted of a five-day suspension from school and a suspension from baseball for the remainder of the year. From this record there appear to be no prior offenses. It is not clear as to exactly how C.J.R. was found to have been drinking, although it seems that the team coach made the initial charges. No medical examination was conducted to confirm the charges.

Respondent has developed a set of procedures which require the following when a student is suspected of drinking or drug abuse:

> Upon notification that a student who may be under the influence of alcoholic beverages or other drugs is present on school property or at a school-approved function, the principal or designee shall immediately notify the parent or guardian and the chief school administrator and arrange for an immediate examination which would include but not be limited to a witnessed urinanalysis of the pupil. The examination may be performed by a

> physician selected by the parent or guarandian or by the medical inspector . . . If the chosen physician is not immediately available, the examination shall be conducted by the medical inspector or, if the medical inspector is not available, the pupil shall be accompanied by a member of the school staff, designated by the principal, to the emergency room of the nearest hospital for examination . . .

Following examination, a written report must be furnished by the examining physician within 24 hours. If the written report is not so submitted:

> . . . The pupil shall be allowed to return to school until such time as positive diagnosis of alcohol or drug use is received.

Another set of policies called "the Holmdel High School Handbook for Students, Parents, Faculty" was submitted by respondent and it indicates with respect to athletic eligibility and participation, that students:

> Abstain from use of tobacco (any form), drugs, and alcoholic beverages. These are prohibited and will result in immediate suspension for remainder of season.

There is nothing in this record which would indicate that a medical examination was conducted or that a report was prepared. A.R. represented that to her knowledge no such test ever took place. Reading the District's policy documents together, it appears that the medical examination is a condition precedent to discipline. Thus we do not reach the question of whether C.J.R. was drinking. Respondent has broad discretion in the matter of discipline, particularly where this relates to extra-curricular school activities, Brown v. Piscataway Bd. of Ed., OAL Dkt. EDU 04561-81 (July 16, 1981), adopted Comm'r of Ed. (Aug. 18, 1981); Kenney v. Bd. of Ed. of Montclair, 1938 S.L.D. 647 (1935) aff'd, St. Bd. of Ed. 649, 653 (1935). Nevertheless, it must follow its own rules. Respondent's policy is plainly based on the notion that allegations must be confirmed by testing and medical observation. The failure to do so here results in unequal treatment as well as some uncertainty as to C.J.R.'s conduct.

It appearing that there is a reasonable likelihood that petitioners will succeed on the merits, that the failure to reinstate C.J.R. to the baseball team pending further proceedings will moot the issue, and that the relief sought is adequately limited, it is **ORDERED** pursuant to N.J.A.C. 1:6A:3-1 et seq. that C.J.R. be reinstatement forthwith to the baseball team. The matter is to be returned to the Department of Education for settlement conference with respect to the five-day suspension which has already been imposed, and with respect to any other issues.

This recommended order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If Saul Cooperman does not so act in forty-five days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

4/30/90
DATE

SOLOMON A. METZGER, ALJ

jz

C.R.R. AND A.R., on behalf of their minor child, C.J.R.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION ON MOTION
RESPONDENT.	:	

The record of this matter, including a tape recording of proceedings before the ALJ, and the initial decision of the Office of Administrative Law have been reviewed. Exceptions by respondent and replies by petitioners were timely filed and are briefly summarized below.

Respondent (hereinafter "the Board") essentially argues that the short notice it received for the hearing and counsel's consequent inability to gather complete information on the district's version of what occurred, and C.J.R.'s not appearing and, hence, not being available for direct testimony or cross examination, effectively precluded the Board from being able to defend itself. Had it been able to do so, it would have demonstrated that C.J.R. had admitted to drinking and that a testing process had been initiated, but was thwarted by C.J.R.'s leaving school property by "taking off" with a female before it could be

completed. The Board further notes that A.R., who testified on C.J.R.'s behalf, never denied that her son had consumed alcohol, although she had ample opportunity to do so. Instead, she focused on the severity of the penalty imposed, as did C.J.R. in a note dated March 21, 1989 (sic) which reads in pertinent part:

> ***This was a one-time incident for me. I feel that the punishment of five days suspension and expulsion from the baseball team is extreme. I request the Board of Education to modify my punishment and allow me to return to baseball this season.***

At the very least, the Board contends, if there is any doubt as to C.J.R.'s conduct in this event, the matter should be remanded for a full hearing.

In reply, petitioners retort that the issue herein is not whether C.J.R. drank, but whether the Board followed its own policy of conducting, or causing the parents to arrange for, a medical examination to determine the presence and extent of the alleged abuse. Here, they aver, they had direct knowledge that no such events occurred, as they were contacted neither to be informed of a proposed exam nor to request that they arrange for one themselves. They further note that, had they refused or failed to comply, the district, by its own policy, would have had to invoke the compulsory attendance law and/or child neglect laws, which was likewise not done. Petitioners claim that use of alcohol has been neither admitted nor denied, and that C.J.R. left practice to be driven home by the team manager (the female with whom C.J.R. allegedly "took off") after sitting "for a long period of time." Finally, petitioners argue that the general tenor of district substance abuse

policies is a positive, helping one, while their son was treated negatively and punitively with no regard for his welfare or special need for physical activity.

Upon careful review of this matter, the Commissioner concurs with the argument, made before the ALJ by Board counsel, that the two policies at issue herein are separate and distinct, as are the ancillary issues arising from their application. The emergent matter which is the subject of this motion is governed by the N.J.S.I.A.A. regulation incorporated into the Holmdel High School Handbook and cited on page 2 of the ALJ's letter decision. That regulation states clearly and unequivocally that in order to be eligible for athletic participation, students must

> Abstain from use of***alcoholic beverages. These are prohibited and will result in immediate suspension for remainder of season.

Unlike the ALJ, the Commissioner does not view the district's general substance abuse policy (File Code 5131.6), wherein the procedures referred to by petitioners are set forth, as an antecedent to application of the district's policy on athletic exclusion. Rather, the latter is a self-effectuating policy in its own right, and can properly be invoked upon a student's admission of alcohol use independent of any testing or evaluation procedure to determine appropriate educational or disciplinary actions.

The events forming the basis for the present dispute occurred on either Monday, March 12, 1990 or Tuesday, March 13, (oral and written representations vary). According to A.R.'s testimony, C.J.R. was notified on Friday, March 16 that he would be ordered to serve a five-day suspension and be excluded from athletic

participation for the remainder of the school year. Although it did not form a part of the record before the ALJ, with its exceptions the Board has included the March 21 note from C.J.R. cited above, which cannot reasonably be construed as anything other than an admission of having been drinking as charged and a plea for a more lenient penalty. In their reply to the Board's exceptions, C.R.R. and A.R. neither commented on, nor objected to, inclusion of this letter, insisting instead that the issue was not whether C.J.R. was drinking, but whether the Board abided by its testing and evaluation policies.

Those policies, however, plainly govern the more serious school-related consequences of student substance abuse, namely those affecting educational placements, programming and assistance, and class attendance. As such, they pertain to the matters of the five-day suspension from school and the district's alleged lack of support for C.J.R. and are not pertinent to the question of the athletic exclusion disputed in this interim proceeding. While a student's admission of alcohol use would appear to trigger an evaluation and, when necessary, related services under Policy 5131.6, this process would have no bearing on the completely independent operation of the athletic exclusion policy, which admits of no preconditions or exceptions in its absolute requirement of loss of privilege as penalty for violation.

With respect to the limited issue now before him, it is clear to the Commissioner that within approximately one week of the alleged incident, and within days of C.J.R.'s notification of the penalty to be imposed, the district had an undisputed written

admission that C.J.R. had in fact been drinking.* For purposes of the athletic rule, no further evaluation was necessary, as the rule itself leaves no room for discretion in application, consideration of special needs or adjustment in penalty based on the relative egregiousness of the offense. Athletic participation is a privilege, not a right, and students must be willing to either abide by plain rules for participation or suffer the consequences of violating them. That other students who were reportedly drinking may have been less affected by the liquor and therefore not identified and penalized, as A.R. argued in her testimony before the ALJ, does not render the rule or its application unfair to the violator who happens to be caught.

The Commissioner here notes that the vast majority of petitioners' claims relate to the district's alleged failure to have followed prescribed procedures before imposing C.J.R.'s five-day suspension from school and its alleged failure to provide any assistance or services to support C.J.R. in his consequent difficulties. In these matters, however, the facts are disputed and the record is insufficiently developed to permit any judgment at this time. While the suspension itself, long since having been served, and any support services C.J.R. might have obtained in the remainder of his senior year, are moot for practical purposes, petitioners have the right to pursue their claims in order to seek expungement of any improper discipline from C.J.R.'s school record.

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* When asked by the ALJ if she or C.R.R. had ever contested school officials' claim that C.J.R. had been drinking, A.R. answered "No."

Accordingly, the initial decision on motion of the Office of Administrative Law is reversed, and the action of the Holmdel Board of Education in excluding C.J.R. from participation in interscholastic athletics for the remainder of the season is upheld. The matter of C.J.R.'s five-day suspension from school and the district's attendant application of Policy 5131.6 shall proceed to an expeditious hearing on the merits.

IT IS SO ORDERED.

COMMISSIONER OF EDUCATION

JUNE 4, 1990

DATE OF MAILING - JUNE 4, 1990

State of New Jersey

OFFICE OF ADMINISTRATIVE LAW

ORDER DENYING MOTION FOR EMERGENT RELIEF

OAL DKT. NO. EDU 4340-90

AGENCY DKT. NO. 148-6/90

C.R. AND A.R. ON BEHALF OF THEIR MINOR CHILD C.J.R.,

Petitioners,

v.

BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,

Respondent.

Richard B. Thompson, Esq., for petitioners (Thompson & Berube, attorneys)

Martin Barger, Esq., for respondent (Reussille, Mausner, Carotenuto, Bruno & Barger, attorneys)

Record Closed: June 8, 1990 Decided: June 13, 1990

BEFORE **JOHN R. FUTEY, ALJ:**

Petitioners seek relief from the decision of the Board of Education of the Township of Holmdel (Board) which denied petitioners' request to allow their son C.J.R. to take a make-up mathematics test after he failed to show up and take a make-up test which he himself had rescheduled with his math teacher. C.J.R claims that he merely forgot about the make-up exam and that his misconduct in that regard should somehow be excused. The issue is whether the district properly denied petitioners' request for a rescheduled math exam.

The matter was transmitted to the Office of Administrative Law (OAL) on June 5, 1990 and was heard on an emergent basis at the OAL, Mercerville, New Jersey on June 8, 1990. After testimony concluded, the record was closed. A synopsis of the order of the ALJ was transmitted by telephone communication to both attorneys on June 11, 1990. This written Order follows therefrom.

Based upon the testimony, I **FIND AS FACT:**

1. C.J.R. is a 17-year-old son of C.R. and A.R. He is presently a senior at the respondent board's high school.

2. He was suspended from the high school between the period of March 19 and 23, 1990, after he was charged with being under the influence of alcohol on March 13, 1990, while at an after school baseball practice. In addition to the five-day suspension from school, C.J.R. received a suspension from baseball for the remainder of the year. Petitioners appealed the baseball suspension and an emergent hearing was conducted at the OAL on April 27, 1990 before Administrative Law Judge Solomon Metzger, under OAL DKT. NO. EDU 3142-90 and AGENCY DKT. NO. 85-4/90. The Commissioner of Education's decision on that motion was rendered on June 4, 1990.

3. During the period of C.J.R.'s five-day suspension, he missed various tests and quizzes in several subject areas, including not but limited to a math quiz and a math test. When he returned to school, he was given an opportunity to make up all of the tests.

4. Upon his return to school, his math teacher, Ms. Lisa Hapeman, advised him that he would have to take the math test and quiz in order to have an opportunity to pass his third quarter marking period. She then allowed C.J.R. the opportunity to decide when and where he wanted to take the tests. C.J.R. failed to discuss this matter with Ms. Hapeman for the next week and one-half. Finally, on April 2, 1990, Ms. Hapeman announced to the class that all make-ups had to be completed in short order; otherwise missed exams would constitute a zero in the grade book. However, C.J.R. was not in class on that day. Ms. Hapeman confronted

C.J.R. the next morning during math class, at which time he indicated that he would be willing to take the test that afternoon (April 3, 19) during eighth period, which is a free period for him. Although Ms. Hapeman waited for C.J.R. that afternoon, he failed to appear. She did not see C.J.R. the next morning because the regular schedule was changed to accomodate the High School Proficiency Testing (HSPT) that morning. However, later that afternoon Ms. Hapeman approached C.J.R. and asked him why he did not show up for the exam. He answered, "Oh my gosh, I forgot!" She then asked him if he knew what that meant and he answered that "Yes, I'll get a zero."

5. Ms. Hapeman further indicated that, prior to discussing this matter with C.J.R., she had re-confirmed the mathematics department policy regarding such make-ups which, in pertinent part, indicated that if any make-up arrangement is made by a student, who then fails to appear, the student is subject to a zero for that test. She also indicated that C.J.R. was aware of that policy since he had already undergone a prior make-up earlier in the year under similar procedures. He received a zero after having taken that prior make-up test in the same eighth period time frame which he selected with reference to the current math test re-exam.

6. Ms. Hapeman also noted that she had never given any student any second chance at a make-up when a student-selected appointment was missed pursuant to math department policy. She also noted that there was no apparent difference between C.J.R.'s attitude after the suspension and prior to that time, which attitude she described as being a general lack of motivation coupled with discipline problems. These problems were identified early in the year and were communicated to C.J.R.'s parents. Extra help for C.J.R. was suggested at that time and Ms. Hapeman remained available three days a week in order to assist C.J.R. or any other students who requested help. According to Ms. Hapman, C.J.R. has never requested any assistance from her, either during class or afterwards.

7. As a result of C.J.R.'s failure to take the make-up exam on April 3, 1990, he received a zero for that test. After factoring in that grade with the rest of his performance during the third quarter, C.J.R. received a failing grade of 59 for that quarter.

8. C.J.R. is scheduled to take his fourth quarter mathematics final on Thursday, June 14, 1990. If he passes that test, there is a likelihood that he will pass the fourth quarter and receive a passing grade for the year in mathematics. Also, assuming that he receives satisfactory grade marks in all other class subjects, C.J.R. will graduate from Holmdel, even if he fails mathematics for the year. In all that event, he will have to take and pass a summer school mathematics class in order to further his education.

9. C.J.R.'s mother indicated that he has been accepted at Fairleigh Dickenson University for the fall term; however, her affidavit reveals and her testimony was that if his final transcript showed an F in college prep math, she felt that Fairleigh Dickenson could decline C.J.R.'s admission in September. She offered no corroborating proof in that regard.

10. She also indicated that C.J.R. has suffered from attention deficit disorder since he was the age of approximately 12; however, she never communicated those concerns to any school authorities because she feared the consequences of classification and possible special education for her son. As part of the attention deficit disorder, A.R. contends that C.J.R. is susceptible to high distractibility as well as inappropriate follow through with tasks. It is for that reason that she feels that her son should be excused from the board's decision regarding the make-up. She also noted that she never received any notices about the scheduling of the make-up test from the school. However, she admitted that she has not followed through with C.J.R.'s progress either by checking homework or seeking any help for him in school. She only asked him how he was doing periodically. She also indicated that she had had numerous contacts with Ms. Hapeman and other school personnel earlier in the

year regarding problems which were identified to her, but instead of utilizing school resources in order to assist her son, she chose to have alternative tutoring conducted for his benefit. She also noted that although C.J.R. had missed other tests during his period of suspension, all of those tests were made up in regular class time, and not during free periods.

11. She also claimed that the suspension caused C.J.R. to become very upset and depressed. No counselling was offered and no home tutoring was done by the school. Only homework was sent home during the period of C.J.R.'s suspension.

12. C.J.R. went to a social worker at respondent's high school on May 30, 1990 regarding his upset, potential alcohol problems and depression. He finally saw a licensed psychologist, Charles Diament on June 7,, 1990 who indicated that he suffers from an adjustment disorder with depression mood which "certainly impairs his decision-making process. . ." (P-1).

13. It is also noted that Ms. Hapeman became C.J.R.'s regular classroom teacher two weeks before the end of the first quarter, at which time his prior teacher left the school district. Ms. Hapeman did not disturb the grades which were assessed by the departing teacher at the time. As a result, C.J.R. received an "A" for the first quarter, although Ms. Hapeman indicated that it would have been a very low "A" or high "B" had she done the grading. She also noted that the former teacher placed no emphasis upon homework or class preparation, both of which elements form a significant part of Ms. Hapeman's approach to education. C.J.R.'s grade for the second quarter was a "D". The Board indicated that there is an established policy regarding substantial grade drops except if it is a reflection of lack of motivation, in which case the parents would be contacted. This procedure was done with regard to C.J.R.'s performance. Yet, despite the intervention of the Board at that level, C.J.R. did not seek out any additional help from Ms. Hapeman in the subsequent months.

ANALYSIS AND FINDINGS

Based upon all the foregoing, I have had a complete opportunity to review the testimony as well as the demeanor of all witnesses in this matter. I have also listened very carefully to the explanations given by C.J.R. and his mother regarding his lack of performance during this school year as well as his failure to take the make-up exam when scheduled. I have also considered the policy and practice of the Holmdel High School mathematics department regarding the scheduling of make-up examinations. Based upon all of those factors, I specifically **FIND** that Holmdel has in place an established policy which allows a student to make up any missed examination after an excused absence. That policy does not place an undue burden upon a student who has missed school for an excused reason since it allows the student to pick the time, date and place of the proposed make-up. Given those factors, the school allows the student the right to get prepared for the examination, but, at the same time, places responsibility on the student to honor the commitment made regarding the make-up appointment. **I DO NOT FIND** this procedure to be unduly harsh, arbitrary or capricious. Rather, it permits the affected student a generous opportunity to anticipate exam requirements. This is distinguished the policy and practice of the school which requires a student to take any missed exam the day after returning from any unexcused absence or vacation.

Further, I specifically **FIND** that C.J.R. has had prior knowledge regarding this procedure since he had the benefit of a similar make-up in the past in the exact same class period. There is no doubt in the mind of this tribunal that C.J.R. knew that he had to take a make-up on April 3, 1990 during the eighth classroom period. There has also been an insufficient showing by petitioner that C.J.R.'s apparent attention deficit disorder (or adjustment disorder, according to Dr. Diament) could cause him to forget the date of a make-up, particularly since it was made by him and was scheduled to be accomplished later during the same day of his decision. All that Dr. Diament indicates is that an adjustment disorder impairs the decision-making process. I **DO NOT FIND** that, once having made the decision to take the exam, C.J.R.'s failure to appear could be otherwise excused.

I also specifically **FIND** that the Board properly notified the petitioners regarding potential problems early on in the year and afforded the parents numerous opportunities to help C.J.R. adjust to his new teacher as well as the increased complexity

of his math studies. Yet, no effort was made to interface with the one person who was in the best position to assist C.J.R., that person being Ms. Lisa Hapeman. I also **FIND** that Ms. Hapeman acted responsibly and professionally regarding the ongoing efforts to educate C.J.R. and **FIND** no merit whatsoever in petitioner's contention that Ms. Hapeman somehow had a personality conflict with C.J.R. The evidence is quite to the contrary, since C.J.R. never had any apparent confrontation with Ms. Hapeman during the entire time of her tutelage. This tribunal was also concerned about C.J.R.'s efforts to avoid taking the test. He knew what the established policy was and knew that he had to take a make-up exam. Yet, he vacillated for one and one-half weeks before Ms. Hapeman sought him out and requested him to own up to his responsibilities. Once having elected his appointment time, C.J.R. was duty bound to follow through with his commitment. And, when he failed to appear at the scheduled make-up date, he had to be sought out again the next afternoon before he claimed that he merely forgot about the exam. This tribunal does not find his excuse to be acceptable or reasonable, given the consistent efforts by the Board to help him meet his obligations.

It is of no small consequence that C.J.R.'s performance during the school year was not much better than marginal. Since his parents were the sole custodians of knowledge regarding C.J.R.'s apparent disfunctions, there is no way that the school or the school district could have been in a position to further understand C.J.R.'s problems, but for the straightforward instruction they gave him and as well as the counselling efforts to address his problems. The parents' lack of candor cannot form the basis of an excuse to avoid adherence to the math department's make-up policy. To do so would violate both the spirit and practice of administering to all students at the high school. I **DO NOT FIND** C.J.R.'s apparent specialized problems to warrant any specialized treatment to deviate from that policy.

This tribunal is sympathetic with the plight of C.J.R.'s parents as well as C.J.R. himself. I am also cognizant of the potential alterations to C.J.R.'s schedule of activity for the next few months and the possible consequences which may attend his matriculation at Fairleigh Dickenson University. Those consequences, however, are more speculative than real. As this tribunal indicated at hearing, there is a great deal riding on C.J.R.'s performance at his math final on Thursday, June 14, 1990. The ball, however, is now in his court and it is up to him to prove that he can successfully complete and pass the fourth quarter. If that happens, there is a likelihood that the entire issue before this tribunal may be moot.

It is noted also that the application before this tribunal came at the latest possible hour even though the parents had had ample warning and notice about C.J.R.'s failings for the third quarter. Curiously, they timely filed an emergent appeal regarding C.J.R.'s participation in baseball, yet chose to wait until this recent time in order to perfect an appeal regarding C.J.R.'s grades. C.J.R.'s mother claims that she was relying upon answers from the school Board before she proceeded to due process regarding the math test issue. However, this tribunal **FINDS** that the delay was unexcusably long and rests solely on the shoulders of the petitioner, and not the Board.

CONCLUSION AND ORDER

Based upon all the foregoing, I **CONCLUDE** that respondent Holmdel has utilized reasonable and fair procedures regarding the administration of make-up tests and did not abuse its discretion in denying the student's request to take a second make-up exam after the student had chosen the date and time of a make-up exam and failed to appear. The student's excuse that he merely "forgot" about his exam appointment does not obviate his responsibility and does not give rise to force the district to make an exception to its routine policy regarding make-up exams. Therefore, it is **ORDERED** that the denial of the request to take a make-up math test by the Board is hereby **AFFIRMED.**

This recommended order on application for emergency relief may be adopted, modified or rejected by the **COMMISSIONER OF THE DEPARTMENT OF EDUCATION, SAUL COOPERMAN,** who by law is empowered to make a final decision in this matter. The final decision shall be issued without undue delay, but no later than forty-five (45) days following the entry of this order. If Saul Cooperman does not so act in forty-five (45) days, this recommended order shall become a final decision on the issue of emergent relief in accordance with N.J.S.A. 52:14B-10.

June 13, 1990
DATE

JOHN R. FUTEY, AJJ

gjb

C.R.R., AND A.R., on behalf of their minor child, C.J.R.,	:	
PETITIONERS,	:	
V.	:	COMMISSIONER OF EDUCATION
BOARD OF EDUCATION OF THE TOWNSHIP OF HOLMDEL, MONMOUTH COUNTY,	:	DECISION
RESPONDENT.	:	

The Acting Commissioner has reviewed the papers filed in this matter as well as the initial Order Denying Motion for Emergent Relief. The Acting Commissioner notes that no exceptions were filed by the parties.

Based upon his review of the above, the Acting Commissioner affirms the finding of the ALJ in denying the motion for emergent relief seeking a second opportunity for petitioners' son, C.J.R., to take a make-up test in mathematics.

ACTING COMMISSIONER OF EDUCATION